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SPEECH BY SIR IGOR JUDGE PRESIDENT OF THE QUEEN'S BENCH DIVISION

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I shall begin by asking you all to ponder the answer to a simple question. What, in your view, is the duty of a judge?

My answer is that the primary duty of a judge is to uphold the rule of law. Indeed I argue that every aspect of the duties of a judge is governed by his duty to uphold the rule of law. Before you suggest that this is mere legal gobbledeygook, perhaps you will remember the force of words attributed to Thomas More by Robert Bolt, chiding his son-in-law:

“This country's planted thick with laws from coast to coast – and if you cut them down – do you really think you could stand upright in the winds that would blow then?”

The rule of law protects us all from anarchy. And when I say that the judge's duty is to uphold the rule of law it is of particular importance when the judge is dealing with the laws which protect the community from crime, and each one of us, as individuals from abuse of process, or power, whether carried out maliciously, or through ignorance. In this context the judge's primary responsibility is the protection of the public. Public protection has two distinct aspects. The first is directed at the interests of the community as a whole. The community must be protected from crime, and, where the exercise of this responsibility arises, the judge should have and does have public protection at the forefront of his mind. I can confidently say that I do not know any judge who does not. Any other view is based on misunderstanding or misinterpretation. The second is concerned with each member of the community as an individual. When he is suspected of crime, the laws which protect his rights, and the safeguards to avoid a miscarriage of justice must be applied by the judge fearlessly, without fear or favour.

This is not the occasion to develop the second of my two themes, that is, the protection given by the law to each individual. If however you find anything in what I have to say tonight of interest, bear in mind that the second theme is no less critical to my thesis on public protection than the first theme, which I want to address in more detail.

Two preliminary, but important considerations:

First, the vast bulk of the laws which govern our lives as citizens are made not by judges in courts, but by Parliament. Believe it or not, judges could not and did not incorporate the ECHR into domestic law. We do not apply the Convention on a judicial whim, or to spite those who disagree with its provisions. We apply it because Parliament enacted that we should do so. And we shall continue to do so unless Parliament repeals the Human Rights Act. Laws are made by Parliament. Judges should not and cannot apply anything more than the laws which Parliament has seen fit to enact. In the end ministers, too, are subject to Parliament and the rule of law, not, I emphasise, the rule of judges, but the laws which govern us all.

The role played by the courts in the protection of society is, in truth, fairly limited. The judiciary is not directly responsible for the prevention of crime, nor for its investigation after

a crime has been committed, nor is the judiciary responsible for bringing the alleged perpetrator to justice, or to arrange for his or her proper prosecution. It is perhaps worth emphasising that the most salutary form of deterrence is the certainty of being caught, and the most effective form of prevention starts in childhood, in proper upbringing and education, and the love and discipline, or loving discipline, which should be the birthright of every child. Before the offender can be sentenced he must either admit his guilt, publicly, or a jury must equally publicly, declare itself satisfied of his guilt. All this is obvious, but a sentencing decision does not arise until all these various steps have been taken. And if the judge decides that the offender is dangerous and that he should be imprisoned for public protection, or for life, once he has fixed the minimum period to be served, the release of the prisoner is totally out of the judge's hands. It then rests with the Parole Board. With any other sentence, the offender will be released after he has served half the period pronounced by the judge. That is what I mean by emphasising the limitations on the judge's powers. Those two preliminary points set aside, but not forgotten, I want to begin by looking at how things stood 150 and more years ago. My purpose is not an essay in history, but rather to examine some of the critical issues without the almost inevitable emotional overlay which current analysis of these issues seems to ignite. Time gives perspective. I am indebted to "The Punitive Obsession" by Giles Playfair for much of the historical information.

In 1863 Lord Chief Justice Cockburn, writing at a time when it was commonly believed, and certainly believed by the judiciary that the "salutary dread of the recurrence of punishment" would provide the best means of deterring the criminal, cautioned against "Too great a tendency to forget that the protection of society should be the first consideration of the law giver".

He reflected a common view that the justification for punishment imposed by the court was the deterrence of crime.

"Its proper and legitimate purpose being not to avenge crime but to prevent it"

For each offence the appropriate degree of punishment would be sufficient to repress it.

"More than this would be a waste of so much human suffering; but to apply less out of consideration for the criminal is to sacrifice the interests of society to a misplaced tenderness to those who offend against its law. Wisdom and humanity, no doubt, alike suggest that if, consistently with this primary purpose, the reformation of the criminal can be brought about, no means should be omitted by which so desirable an end can be achieved. But this, the subsidiary purpose of penal discipline, should be kept in due subordination to its primary and principle one".

Lord Cockburn accepted that barbaric sentencing practices were unacceptable.

"Punishment should be made as rigorous as is compatible with due regard for humanity, and consistent with the health of body and mind of those subjected to it".

So, punishment and deterrence, but not inhumanity to the criminal, and his possible reformation. Does anyone quarrel with that?

One of his contemporaries, Lord Wensleydale, advocated the retention of capital punishment by way of hanging, for a rather surprising, and although I am not advocating them, series of challenging reasons.

"There are punishments which are capable of a much greater deterrent effect than death, but they are punishments which the public would not for a moment endure, such as mutilation, cutting off of all a man's members, depriving him of his eyesight, depriving him of his power of hearing, cutting off his limbs, confining him in a small place without the light of day, and so on. Punishments of that kind would deter much more than the taking away of life, but I am sure that the public would not endure them."

It was, of course, a public which endured public flogging, the pillory, the stocks, and transportation.

I have taken some time with nineteenth century judges, not in order to suggest that we should return to the nineteenth century, but because their comments illustrate the tension between effective punishment as a means of contributing to the protection of society from

crime, and the limitations to which it should be subject, represents one of the most perennial problems in criminal justice. And one of the reasons why it is perennial is that the attitude of society is itself in a constant state of flux. I suspect that each one of us changes his or her views over a lifetime. Moreover it is a topic on which each individual is not only entitled to have views, but exercises that entitlement, sometimes with great vehemence, not always demanding heavy punishment, but rather focusing instead on rehabilitation and reformation. What is more, everyone has a view about which case requires which form of disposal.

Here, at King's College London, we have a very good example of changing attitudes in the depressing example of Professor Maurice. He was summarily dismissed from his chair a few years before Lord Cockburn expressed himself so trenchantly. He challenged the very deeply held view, based on the then current understanding of Christian belief, that in the ultimate analysis, the Almighty would reflect on the activities on this earth of every single soul who had departed from it, and punish those who had transgressed. Hell fire was an essential aspect of this belief. Because it was believed that Professor Maurice minimised the "evilness of sin and the awfulness of its doom", his teaching on the subject of eternal punishment was regarded by the Council as "of a dangerous tendency and calculated to unsettle the minds of theological students". It would be difficult to find very many people in this hall today, or in any comparable group of people meeting in a similar hall, who would not be marginally uncomfortable with the reality of eternal damnation in hell fire as the ultimate sentence for sinners. Indeed this amazing change in our fundamental beliefs may – I emphasise that "may" – have itself contributed to an increased value which we now attach to each individual human life. The thesis would be that if we genuinely believed that the end of bodily life on this earth represented not finality, but simply the continuation of the journey of an immortal soul, we should value the way in which the life had been lived at least as much as its actual length. But, at any rate, I trust you will agree with me, that we should respect the views of Professor Maurice, and the moral courage which led him to express views which were so unacceptable when he taught them, but which are now taken entirely for granted. No wonder Charles Darwin waited so long before publishing the results of his analysis of the Origin of Species.

And, if I may, I respectfully suggest two essential principles to grasp. You should never assume, first, that contemporary society has banished intolerance of those who take a view which contradicts the passionately held beliefs of the substantial majority of the rest of society, and second, that contemporary society has achieved ultimate knowledge and wisdom, and that our contemporary ways will always be thought of as best, and right. They will not. Ideas are on a constant journey. Which, I wonder, of our most cherished beliefs today will turn out to be misplaced, and the subject of derisory laughter in fifty years or one hundred years time? We really should be modest.

We can probably all agree on a number of basic principles. Sentencing judges are expected to do whatever they can to achieve the protection of life and body, and indeed property. They must do what they can, within the strict limitations already identified, to achieve the reduction of crime to what may be described as the "irreducible minimum". For this purpose, a system for punishment and deterrence is essential. If the system itself is to command public confidence, which it must, it must be perceived to produce justice, where just deserts are required, and mercy, where mercy is appropriate. Whether everyone wants the education and rehabilitation of the offender may slightly depend on whether we are addressing the problem from the point of view of the offender, in which case some at least would describe the adherents of that view as "bleeding heart liberals", or from the point of view of the community, in which case education and rehabilitation may themselves serve to produce greater long term public protection from the offender by achieving his reform. Why do I say that the system must be perceived to produce justice? The consequences if it does not are disastrous. Some victims of crime do not report them, because they see no point. So the offender can commit yet more offences. People become disproportionately frightened of crime, basing their fear not on reality but on perception. Most important of all,

people believe that if the law will not give them protection, they must take it into their own hands. That is a direct route to anarchy, and the collapse of the rule of law.

The critical difficulty is that we all differ in our views of which cases demand justice, and which persuade us to mercy. What combination of individual circumstances causes the balance to come down on one side or the other?

Judges believe that sentencing decisions in each individual case are their responsibility, but they are not making their decisions in a vacuum. Can we just reflect for a moment on what Parliament requires of sentencing judges. The Criminal Justice Act 2003 required that the court dealing with an offender “must have regard” – notice the “must” – to five identified purposes of sentencing. Each one of these is a specific purpose. They are:

- The punishment of offenders;
- The reduction of crime (including its reduction by deterrence);
- The reform and rehabilitation of offenders;
- The protection of the public and
- The making of reparation by offenders to persons affected by their offences.

These are all purposes of sentencing. The court must address each of them. Notice that the punishment of offenders is a distinct purpose from the protection of the public and the reduction of crime.

Notice this too. The court has to consider the seriousness of the offence. And that means the offender’s “culpability” in committing the offence, and the harm which the offence caused, was intended to cause, or might foreseeably have caused.

There is a restriction on the imposition of a prison or custodial sentence. The court is not allowed to pass such a sentence unless it concludes that the offence, or a combination of the offences before the court, was so serious that neither a fine alone nor a community sentence “could be justified”. In other words if a non-custodial sentence could be “justified”, a custodial sentence cannot be passed. And if a custodial sentence is to be passed, then the custodial sentence “must” be for the shortest term that in the opinion of the court is commensurate with the seriousness of the offence”.

So Parliament tells us that a custodial sentence is the last resort, and if imposed it must be for the shortest possible time. That is the statutory framework. It is the law laid down by Parliament. Judges must apply it.

If the offence is a specified violent or sexual offence, the court has to address provisions applicable to dangerous offenders. If one of these specified offences is committed, and the court concludes that there is “significant risk to members of the public of serious harm” occasioned by further offences, then the court must impose either life imprisonment (which in fact is reserved for only the most serious offences in specified circumstances) or a sentence of imprisonment for public protection. This provision came into force in April 2005. It only applies to offences committed after that time. Notice, this is not punishment for past offences. This sentence is directed at the future, and the significant risk of future harm represented by the offender. Since this power was given to courts, I understand that something over 1,500 orders have been made. The courts are also required to set the minimum period which must elapse before the offender can even be considered for release. In fixing that term, the shortest period still has to be applied, and then, if appropriate, reduced for the guilty plea. And that figure has to be halved, and the period on remand before sentence has to be deducted. None of these matters are discretionary. If the judge is to uphold the rule of law, and follow the statute, he has no alternative.

So let me return to the purposes of sentencing. Punishment is about retribution for the offence. The offender must be punished according to his deserts. The punishment should fit the crime, and, of course, its impact on the victim. But punishment in a developed society should not be inflicted for or reflect private vengeance. It is for society itself, first, to see that so far as practicable each individual is protected from injury by criminal conduct, and

second, when it has failed to provide that protection, to identify the offender and mete out the appropriate punishment. Ferocity of sentence, as Lord Wensleydale pointed out, does not answer all the questions. In 1628, a boy aged 8 years was hanged for setting 2 barns alight. It was suggested that if he was old enough to start a fire, he was old enough to pay for the consequences. To us that is shocking. What it certainly has not done is to prevent arson.

In 1785, a Select Committee of the House of Commons reported that “the late increase in the number of public executions” (that is a euphemism for hanging) had “produced no other effect than the removal of the offenders in question”. This addresses incapacitation, but as the Committee went on to acknowledge, crimes continued to “multiply in defiance of the severest exercise of justice”, again meaning hanging. Transportation, first to the colonies in America, as they then were, and later to Australia, was founded on the belief that first, it was a merciful alternative to hanging, and second if you could despatch criminals out of the country altogether, the effect would be that crime overall would diminish. Some then thought transportation a soft option. But then listen to this comment by the Inspector of Prisons in 1875, recalling that a sentence of 100 lashes with the “cat” for an assault on an officer was remitted to 50 lashes:

“Were proof required of the exceeding mildness of the rule under which Milbank was governed we should have it here. But, really, all milk and water tenderness is misplaced in the management of criminals”

These were not soft times.

The sentencing process involves retribution and punishment. It is foolish to pretend otherwise. Each generation sets its own standards about the levels of punishment which may be appropriate. Some crimes demand the most severe punishment. For murder, the sentence is life imprisonment. It is mandatory. It reflects public abhorrence of the crime.

Lord Denning’s evidence to the Commission on Capital Punishment explained that:

“The punishment for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them.....the ultimate justification of any punishment is not that it is a deterrent but it is the emphatic denunciation of the community of a crime”.

This principle is well understood.

There are offences at the other end. The old age pensioner, of impeccable good character, who, at the age of 76, pinches a couple of tins of salmon from a store is almost certainly crying for attention and help. 200 years ago or so, the theft of tins of salmon, worth, say, £3 would probably have condemned the old man or woman to capital punishment. Even then, the chances are that the jury would have acquitted, to express its own revulsion of such punishment, and if the offender were convicted, he or she might have had the penalty commuted to transportation. Today, could anyone argue that a non custodial order designed to help this particular sad individual would be inappropriate.

Somewhere between the most heinous of crimes, and the saddest of crimes, there is the vast grey area. And it is in this vast area that the reduction of crime, including its reduction by deterrent, but not excluding any other form of reduction, and the reform and rehabilitation of offenders, as well as their punishment, fall to be considered.

The concept of the reformation of offenders is not new. In 1779 prisons run by central government were authorised, for the first time. They had two purposes,

“Deterring others from the commission of crimes, but also of reforming individuals, and inuring them to habits of industry”.

Reformation or rehabilitation may simply be an acknowledgement that the ultimate future safety of society from the depredations of some offenders at any rate is best served by his or her rehabilitation. Of course, a balance has to be provided, so that the process of rehabilitating one offender does not convey a misunderstood message which would diminish the element of deterrence to other offenders.

Let us examine real examples. Some men (and it usually is men) gain sexual gratification from doing the most dreadful, unspeakable things to a child or children. No one doubts that offenders like these should be locked away probably for the rest of their lives, possibly until they are so old as to be utterly harmless. Yet, consider a 17 year old backward, immature boy, himself the victim of childhood abuse, who on the underground puts his hand on the

bottom of a woman over her coat. That is an indecent assault and should rightly be punished. However, to send this particular offender to custody will do nothing for him. He will not mature. He may well leave his custodial sentence more muddled and dangerous than before. The imperative is his rehabilitation and education before he commits a more serious offence. Supervision in the community, with expert attention directed at his problems would probably provide the best future protection for the public. If the judge made such an order, he would not be "soft": he would be directing his attention to that long term protection.

Take, for example, drugs: one of the most pernicious factors in crime. Numerous offences of violence are drug related: so are large swathes of offences of dishonesty, and burglary and robbery in particular. In the first group, the drugs have reduced inhibition, or produced increased aggression: in the second group, the goods are stolen to fund the purchase of drugs. There are some remarkably effective drug treatment projects. Some, indeed, are available in prison: but others are not. In cases like these, the first question for the sentencer is, what is the appropriate punishment for the crime? The second, however, is how can future crime by this offender be reduced, diminished, and ultimately extinguished? There are many cases where the better prospect for the future will be provided not in custody, but outside in the community, under strict supervision by high quality, responsible men and women. It is very salutary to visit a well run drug treatment and testing order. There will, inevitably, be failures. But every success, and there are many, provides long term public protection.

And perhaps it is worth bearing in mind that public protection comes at a cost to the public. In 1933 the Prison Service cost a total of just over £1.25 million to run. At the end of 1968, the figure had risen to just over £37 million. Without accounting for inflation, the annual running cost of the Prison Service to the community is now just over £2 billion.

There is only so much public money available. No one begrudges the cost of a prison to incarcerate those convicted of the most dreadful crimes, even if that might delay the building of a new hospital, or a new school. But people do question, although they would all come up with different answers, whether the cost of building a new prison at the expense of a new hospital is appropriate, if those incarcerated in the new prison, might reasonably have been dealt with by way of a community punishment, doing useful work for the community, in their own time, and at no public expense. Last year no less than 5 million hours of such free service were provided. Again, as with everything else, the value of the work depends on individuals. But I have seen what I thought were remarkably effective community orders. The issue always is, where in each individual case the line between custody and non custody should be drawn. Some might say that a shoplifter should not be incarcerated, but how many times should the same offender be allowed to commit shoplifting before a custodial sentence is imposed? Others would say that every shoplifting offence merits a custodial sentence, because the number of such offences that go undetected, and the cost of employing security to keep the number of these offences within bounds, adds considerably to the cost at the tills. On the other hand each place in prison costs the community something like £40,000 annually. So, and I know this is superficial, instead of paying the costs at the tills, you pay for them in your taxes. And, in any event, you wonder whether it would stop shoplifting. When petty theft was a capital offence, it continued. These are all legitimate considerations.

My thesis is that in the part of the criminal justice process for which judges are responsible, the judicial obligation to have in mind and contribute to the protection of society is clear. There can be no dispute about the principle. The real issue is how best that objective can be fulfilled in each individual case. Lock him up and throw the key away may be an inelegant way of approaching the worst kind of case and the most dangerous offenders. But surely, only for such offenders. Every other offender will one day be released. How best then, to protect the public from him and the risk that he may pose? Even when our sentencing policies were of a ferocity which would be unacceptable nowadays, it was recognised both by Parliament and by judges that reform of the offender was itself highly desirable. That is not altruistic. It acknowledges the reality that public protection in the long term, and with a

significant number of offenders, may best be achieved by reform and rehabilitation. Sometimes, punishment is the only feature: sometimes a non-punitive sentence is right. For most cases, the requirements of justice and mercy have to be balanced. And the decision making process in these cases should always reflect the reduction of crime and the protection of the public. So the argument is not about the principle, nor about the judiciary's perception of its responsibility, but the best way to achieve it.

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