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Law Reform and Civil Liberties in Britain

PERSPECTIVE

THE RIGHT HON. THE LORD MACKAY OF CLASHFERN*

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Judge Wald, Ladies and Gentlemen, it is always a particular pleasure for a British Lord Chancellor to visit the United States, and still more so when the programme allows him to address an audience of American lawyers. For me, on my first visit to Washington, I find it very comforting that British and American lawyers share a fundamental similarity of approach.

This, of course, is no surprise. Our legal ideas spring from shared origins. As you know, I was brought up in the Scottish legal system which was, and remains, quite different in many respects from the common law systems with which you are probably more familiar. It has not always excited the admiration of common lawyers. Many years ago a distinguished English judge referred to Scots law as "those interesting relics of barbarism, tempered by importations from Rome." Although Scots law developed to a considerable extent in its native soil, it was greatly influenced in the seventeenth century by the study in the Low Countries of many distinguished Scottish lawyers.

Notable amongst these was Viscount Stair, who wrote a comprehensive work on the law of Scotland which remains authoritative to this day. By the Treaty of Union under which the Parliaments of Scotland and England were united into one, provision was made for the retention of the distinctive legal system. Over the 280 years or so that have passed since then it has been natural for Scottish

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lawyers to look south, and to familiarize themselves with the methods of approach and the institutions of the English system of the common law.

In the House of Lords there is a unique opportunity for comparative study of the two systems since the House of Lords is the Supreme Court of Appeal in civil matters from both, although in criminal matters no appeal lies from the Scottish courts to the House of Lords. Indeed it is fair to say that amongst the great landmark judgments of the House of Lords that have affected the English law, *Donoghue v. Stevenson,* which was a Scottish appeal, ranks amongst the most important.

It is something of a feat for a snail to get into a bottle of ginger beer, but the Paisley snail can lay claim not only to having done that, but also to having transformed the common law of negligence. That snail has a place in legal systems across the world.

Although therefore I may not have been as deeply steeped as many of you are in the approach of the common law, I have worked with it, and been most impressed by it for a long time.

As a result, I appreciate how strongly you share the origins of the system of common law which grew up in England and Wales. The English system and your system have contributed to the progressive development of the common law which is still to a remarkable extent common to our two countries. I have often found references to decisions of the courts of the United States a fruitful source for stimulating thoughts on problems which I have faced. In a recent speech of mine when I was a Lord of Appeal in Ordinary I made extensive quotations from your judgments.

But of course there are differences. When our problems have differed we have inevitably found our own solutions to them, but, even when we have had problems in common, our distinct professions have often been led to approach their solution by different routes. But, even then, the search for a solution has always been against the background of a fundamentally similar legal, social, and political perspective in which democracy and freedom are preeminent. We speak the same legal language, even if we sometimes say different things. (I have to say in parenthesis that my English friends often have difficulty with the language of Scots law.)

But what is important is that we should understand each other properly. Distance can encourage distortion as well as add enchantment. Looking east or west over three thousand miles of ocean is not always the best way to appreciate the finer points of what we may each be trying to do. But, even viewing the matter at this distance, I am sure our similarities are many. We both seek change without which a system of law ceases to reflect the society it serves and command its respect. Without change, old rules may impose an absurd tyranny.

And that brings me back to the title of my speech. Law Reform and Civil Liberties. Or, if you like, Law Reform and the Rule of Law—the need for change within the existing fundamentals that preserve the underlying system through all

change. I am reminded of Burke's dictum that a state without the means of some change is without the means of its conservation.

But how much change? And how clear are the lines between conservation, reform, and a fundamental change of character?

These are questions that have on occasion to be asked on both sides of the Atlantic. You approach these matters from the point of view of a written constitution. Some of us are apt to think that this may be over-rigid. We approach these matters from the point of view of the respect for our legal values in Parliament and in the courts.

It is easy to caricature and exaggerate the contrast between the systems. In the United Kingdom, respect for individual liberties, the protection of the rights of individuals against the authority of the State, are deeply rooted in British tradition. The Magna Carta some 750 years ago, the Habeas Corpus Acts of the seventeenth century, the Bill of Rights and the Claim of Right for Scotland, whose 300th anniversary we celebrate at this time, are all vital milestones. Our history has taught us to cherish the basic civil rights of equality before the law and of individual liberty.

The fundamental assumption of our law is that every man and woman is free, unless there is some law which restricts that freedom. It is this concept of the rule of law that has safeguarded our rights and protected our liberties throughout our history.

But, as I said, change is always essential. For some of us it is surprising how much change you can achieve within the framework of a written constitution. I think I might be allowed to say that remarkable change has often been able to proceed without an amendment of the constitution.

Your judges have shown a skill in achieving change while exhibiting loyalty to the constitution in a way which excites my most profound admiration. Equally, in our system, the fundamentals have been preserved, although the scope for change by Parliament has appeared almost limitless. First of all, generally Members of Parliament themselves and those who elect them cherish the values to which I have referred, and our courts have always in a most independent and respected way been able to administer the law, not only the Common Law which they themselves have developed, but the law enacted by Parliament, in a way which incorporates these values.

Indeed, one of the most striking developments in the British legal system in recent years has been the development of judicial review: I believe this control by the independent judiciary in accordance with principles that are clear has been an important development which illustrates how our system can adapt to ensuring that these important legal values are applied to the administration of law at all levels in our society.

I would like to illustrate what I have just been saying about the United Kingdom by reference to two recent examples. The first relates to the law which deals with official secrets, and the second to the work of our Security Service.

First, the question of official secrets. For any democratic state, their protection raises very difficult issues. But our present legislation, dating from before the First World War, has long been the subject of intense criticism, not least because of the "catch all" nature of section 2 of the 1922 Official Secrets Act, and the difficulty of mounting successful prosecutions under it.

It has long been recognized that this part of our legislation should be reformed. The present Government has now introduced into Parliament legislation which aims to penalize only those disclosures which would cause a serious degree of harm to the United Kingdom's essential interests. In doing so, the Government has substantially narrowed the range of categories of information which properly need the protection of the criminal law.

The proposed law therefore covers information in the categories of security and intelligence, defense, international relations, information received in confidence from other governments or international organizations, crime, and special investigations. In all but the last there is a test of harm in, or in the case of crime, inherent in, the category which would have to be met before unauthorized disclosure was a criminal offense. Disclosures of a wide range of official information, indeed the great majority of such information, will no longer be subject to the sanctions of the criminal law.

The Bill sets out appropriate defenses both for Crown servants and Government contractors, and others. It also creates an offense, where it will not be necessary to prove harm, for the unauthorized disclosure of any official information relating to, or purporting to relate to, security and intelligence by a member or former member of the security and intelligence services or those who work closely with these services.

The legislation goes farther than any previous Government has been prepared to go in narrowing the scope of the criminal law, in applying tests of harm to disclosures of official information, and in leaving the decision on whether these tests are met by any particular disclosure to the jury. The legislation is controversial, but the Government believes that its proposals strike the right balance between the protection of the public interest and the safeguarding of individual freedom of expression.

These developments have been represented in some quarters as an encroachment on civil liberty. That is, I believe, a serious misrepresentation of the true position. The truth is that the Bill represents a very important step forward in the direction of liberty by greatly reducing the previous scope of the criminal law in this area. It is a liberalizing measure.

Similarly, the Government has introduced a Bill which for the first time puts the Security Service on a statutory basis and establishes the legal framework within which it must work. The Bill also provides for a high-powered Legal Tribunal which, with a Commissioner drawn from the ranks of the judiciary, will deal with complaints about Security Service activity and which will be able to order financial and other remedies when they find in favor of the complainant.

There is also some misrepresentation in another area where both our countries share a common aim. This concerns the ways in which it is proper in a democracy to deal with terrorists. We have seen in recent years an alarming increase in international terrorism, some of it state-sponsored, which has posed challenges for us all. But we have no choice when faced with terrorism and violence. It is a fundamental principle that governments should make no concessions to terrorists. At the same time, actions against terrorism must be reconciled with individual civil liberties. Terrorists operate outside the law: we and our security forces must operate within the law.

In the United Kingdom we have to face the particular threat posed by terrorists in Northern Ireland, Northern Ireland is a democratic society where everyone has the right to vote. Nationalism is respected, provided that it is pursued through the ballot box. We surely cannot countenance its being pursued by the bullet.

Successive British Governments have recognized the particular problems of the Province. This Government has introduced a wide range of measures to protect human rights and prevent discrimination. We have focused on promoting equality of opportunity in employment and preventing discrimination on religious grounds. The Anglo-Irish Agreement commits both the British Government and the Government of the Republic of Ireland to respect the democratic choice of the people of Northern Ireland over their future status.

Terrorists attract very little support, even among the nationalist community, at the polls. Sinn Fein has received 11.4 percent of the poll in Northern Ireland and 1.9 percent of the vote in the Republic of Ireland in the General Elections of 1987. That is why they try to impose their views through violence and intimidation. It is not surprising that an alarmed and frightened public should sometimes call for stronger measures against terrorism in Northern Ireland and greater use of preventive measures which they would not normally be prepared to tolerate. But for a government to go too far to respond to this type of public pressure would only play into the hands of the terrorists, whose purpose is to force us to abandon or compromise the democratic principles to which *we* are committed and which *they* so blatantly disregard. Not only must we operate within the law, we must be seen to do so.

The British Government has, therefore, introduced certain even-handed measures in the last few months designed to deal with particular problems created by Northern-Ireland-related terrorism. Two of them relate to the right of silence, and access to the media by certain extremist organizations. These measures have had wide publicity, including in the United States, and have attracted some critical comment by those who—quite understandably—fear that the measures might unduly have a repressive effect and might infringe civil liberties.

Such fears are misplaced. I believe that most of our critics may not be fully acquainted with the facts. The proposals concerning the right to silence do *not* abolish the right of a defendant to remain silent during police questioning and during trials. An accused person is not obliged to make a statement, nor is there

any suggestion that silence should be an offense. Parliament has approved proposals that the General Criminal Law in Northern Ireland should be amended to permit the courts in four particular circumstances to draw whatever inferences would be proper from the fact that an accused remained silent.

The first circumstance is the so-called "ambush" where, having remained silent during the police questioning, the accused offers an explanation of his conduct for the first time at his trial, when he might reasonably have been expected to offer it during questioning. The second provides that, if the prosecution can establish that there is enough evidence for the accused to have a case to answer, the accused must be warned that he will be called to give evidence, and, if he should refuse to do so, the court may draw such inferences as would appear proper. The other two provisions, which have the same effect as similar legislation in the Irish Republic, allow the court to draw such inferences as would appear proper from the accused's failure or refusal to explain to police certain specified facts such as substances or marks on his clothing, or to explain his presence at a particular place.

We intend to introduce changes along similar lines in England and Wales.

These ideas are by no means new: on the contrary, they follow very much the thrust of a report by a distinguished independent body, the Criminal Law Revision Committee, a number of years ago.

I must emphasize that these provisions do not shift the burden of proof from the prosecution to the defense. It is still the case that the prosecution has to prove its case and the court must be convinced beyond reasonable doubt of a defendant's guilt.

Silence in the face of accusation will never be enough. What you have to remember is that terrorists are well-trained and disciplined criminals. They are trained to remain silent, and to withstand questioning for very long periods. The challenge faced by justice today is the planned exploitation of the criminal justice system by those involved in organized crime or terrorism.

As for the British Government's decision to limit access to radio and television by extremist organizations on both sides of the sectarian divide, these measures are similar to those which have been in place in the Republic of Ireland for many years.

The restrictions affect only direct access to the air waves for the named organizations and their supporters. Their activities and words can still be freely reported, as they are in the press, but the terrorists are denied the ability to appear on television, and thereby obtain a spurious authority and respectability. But there is no question of denying anyone the right to hold or express a political opinion. That would, of course, run counter to the principles and aspirations of a democratic society.

When he spoke in Parliament to introduce these measures, the Home Secretary acknowledged that such restriction represented a serious step, and one that the Government had taken only after very careful consideration. He said: "Those

who live by the bomb and the gun and those who support them cannot, in all the circumstances, be accorded the same rights as the rest of the population."

Changes have to be made, but what is important is that they should do so within the limits of a free democratic society subject to the rule of law. We all in this room share a profound belief in civil liberties.

The United Kingdom has demonstrated that belief by becoming a party to the European Convention on Human Rights; and by going further, and allowing individual citizens of the United Kingdom the right of petition to the European Commission and Court of Human Rights, which can grant a binding ruling if the Court accepts that the state has failed to safeguard the complainant's human rights.

Further, the British Government is a party to the United Nations' Covenants on Civil and Political Rights. And, while the United States has not yet felt able to become a party to these United Nations Conventions, our common cause in this area is amply shown by our both having subscribed to the human rights provisions in the Helsinki Final Act and subsequent instruments within the CSCE process, including those adopted in Vienna only last month.

Just as we must change and adapt in the substantive law, so we must also constantly ensure that our citizens have access to justice.

On that theme, I should like to mention a topic which has certainly made headlines in the English press recently—my proposals for reform of the work and organization of the legal profession and the provision of legal services. It may be that the wave of interest which these have raised in the English legal community has caused ripples to stir even on this side of the Atlantic.

So, what have I suggested? On the work and organization of the legal profession I have proposed that we start from first principles. In other words, we ask ourselves what sort of legal profession we require in order best to provide the legal services which the public needs, and how we can achieve this. I regard education, training, qualifications, and standards of competence and conduct as the key to this analysis.

We need to ensure that the services provided are of the right quality for the particular needs of the client. As you know from your experience with para-legals and legal clinics, it is not always necessary for legal services to be provided by a fully trained lawyer. It all depends on the area of legal service in question. My proposals cover many aspects of the provision of legal services, but let me take one area—advocacy—to illustrate what I mean about starting from first principles.

As you probably know, barristers in England and Wales currently have a considerable monopoly over rights of audience in the higher courts. This is regarded by some as an unjustifiable restrictive practice which serves to increase costs to clients and diminish their choice. In today's competitive climate, where people are increasingly aware of their rights, this monopoly needs to be re-examined in the context of rights of audience as a whole. It is not just a

question of cost; it is a question of advocates fulfilling their duties to the court and client in the context of the administration of justice. We have addressed this question at some length, and we think the answer is education, training, qualifications, and conduct.

We have suggested that all advocates should have to undertake the same minimum training in advocacy and undertake to abide by the same minimum standards of competence and conduct before being allowed to appear particularly in the higher courts. If they meet these requirements, their professional body will be entitled to authorize them to practice as advocates. The objective is to ensure adequate standards of competence and conduct, while increasing the range of client choice, thereby allowing the forces of competition to ensure that clients get the best value for their money and a wider range of services. This means, of course, that practitioners other than barristers may be able to appear as advocates in the higher courts. Some barristers are saying that this will mean that our system will become like yours with specialist trial lawyers attached to large firms; and they say that there will be no role for the independent advocate whose services are currently available to all solicitors throughout the land. I would be very interested to hear what you have to say about your experience of this.

My own view is that there will continue to be a significant number of independent practicing advocates. I believe there will always be a substantial demand from the public for the kind of independent specialist advocacy services which the Bar currently provides. I think that there will always be a role, and an important one, for practitioners who wish to practice full-time as independent specialists in advocacy, in providing the public with representation before the courts. The only difference in the future will be that the Bar will survive by excellence, and not because it is buttressed by legal restrictions on those who can compete with its members.

I also want to emphasize that the legal profession will continue to be independent from the State. There will be a statutory framework for all professions seeking to offer legal services, but the actual certification of individual advocates and, where appropriate, the withdrawal, variation, suspension, or revocation of an individual's certificate will be entirely in the hands of the advocates' supervisory professional body.

I should perhaps mention one other matter which may be of particular interest to some of you, and that is our proposals on contingency fees. We want to see if it is possible to introduce some form of contingency fee arrangement in order to make justice more readily available to a wider section of the population in England and Wales. We are well aware of some of the problems associated with contingency fees in your country and we discuss these in our proposals. We may well prefer to choose a system that relates the lawyer's reward to the work done and not to the damages awarded.

These reforms deal with the service provided to the public by lawyers, but the courts and their procedures must also suit the needs of those whom they serve:

the litigants. My main objective in moving to modernize the legal system is to improve the service offered to the public by the courts and the legal profession. My predecessor, Lord Hailsham, had this aim in mind when he set up the Civil Justice Review in 1985. That review looked at reducing delay, cost, and complexity in civil litigation. Its final report, published in June 1988, produced over ninety recommendations, based on reports by management consultants and an extensive public consultation exercise, for reform in court structure, procedure, and administration.

These proposals for reform have as their main concern the public need to have access to a system of justice which provides services as efficiently and cost-effectively as possible. Delay, outdated procedure, and too much legal jargon discourage people from pursuing their rights. My programme for the reform of the civil courts will seek to remove these barriers.

The primary function of the civil courts is to provide a service to the people who use them; and my objective in taking forward the recommendations of the Review, along with other initiatives which are being developed in my Department, is to ensure that the legal system keeps pace with social needs. In seeking to make progress, we study with the greatest interest what you do. We shall, if we may, seek to develop our own system in the light of that and all our other studies.

It is, as I said, a real privilege to address a gathering under the auspices of the American Bar Association. Since I am here in connection with the celebrations of the events of 1688–89, which we remembered in Westminster Hall in the company of most distinguished representatives of the United States of America, I am forcibly reminded of that great gathering of the American Bar Association in Westminister Hall in 1986, addressed with characteristic eloquence by my distinguished predecessor, Lord Hailsham. Nothing was more fitted to remind us of our common heritage. No memory could better spur us on to carry into the future in both our countries the love of liberty, or ordered change, and of equality under the rule of law, which we have all been taught by our past to hold dear.