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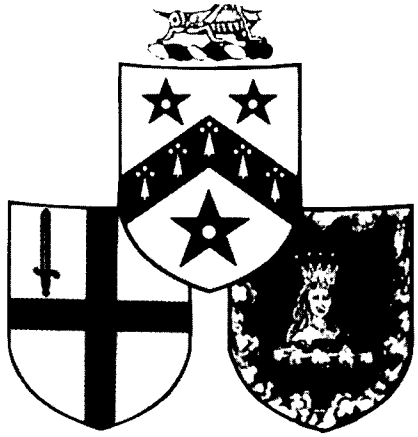

Six lectures given by

PROFESSOR SIR DAVID CALCUTT QC
Gresham Professor of Law

14 October 1992
A BARRISTER AT WORK

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GRESHAM COLLEGE

"A BARRISTER AT WORK": WEDNESDAY, 14 OCTOBER 1992.

SIR DAVID CALCUTT

May I begin my inaugural lecture by paying three tributes? First, to Gresham College; second, to my predecessor, Professor Simmonds; and third, to you, my audience. Let me take each in turn.

When David Vermont, then the Chairman of the Council, wrote to me, "Gresham College" was little more to me than a name. But then I remembered. In about 1970 there had been a great case in the courts. Was a somewhat doubtful musical instrument, known as a "stylophone", subject to purchase tax or was it not? That depended, in part, on whether or not it was a "keyboard instrument". The makers, my clients, challenged the Customs and Excise. We called Antony Hopkins as one of our witnesses. "And you are, I believe, the Gresham Professor of Music" - having no idea what the Gresham Professorship was, but hoping to add to Professor Hopkins's already very considerable credibility. The judge was immensely impressed. And I need hardly say, we won.

Now I have come to know a little more about the College. One thing has immediately impressed me: the freedom and latitude which the College is apparently willing to allow to its lecturers, to speak about what they will, and in the way they consider likely to be most effective. That I find most impressive, most encouraging.

May I turn, secondly, to my distinguished predecessor, Ken Simmonds? His distinction as an international lawyer is well-known and the range and depth of his writings proverbial. With an Opinion on "Conflict in the South China Sea", with articles on the "International Regulation of Deep Seabed Mining", through to a lecture on "Maastrict and After", I cannot but conclude that Professor Simmonds has served Gresham College well. One word of warning. As I will explain to you in a few moments, what you will receive from me will be of a wholly different order.

Thirdly, my tribute to you, the audience. You have come here on an all-but blind date. "A Barrister at Work" might mean absolutely anything; and might even mislead you; and even three lines of printed explanation do not really carry you very much further. So I should congratulate you on coming here this evening, more, I suspect, in trust than in anything else.

What I have in mind is this. It has been my good fortune, over the last 35 years, to have had practical experience of a wide range of distinct legal and quasi-legal activities in a judicial or quasi-judicial capacity. These lectures provide an opportunity, which I very much welcome, to review some of those activities, and the things about them which have interested me, and then to discuss that review with you. But I would emphasise one thing: the lectures will be based simply and solely on such practical experience I have had. I have decided, quite deliberately, to avoid carrying out any learned research; but rather to speak simply from experience. As Lord Denning said, at the opening of his first Hamlyn Lecture, in 1949, "If you

have come expecting a scholarly discourse, replete with copious references, I fear you will be disappointed". 90% of my time and energy has been spent doing the job in hand. But, inevitably, if you are asked to take something on, you pick up something of its historical setting; occasionally you think about the job in a context wider than is necessary to resolve the immediate problem; occasionally you reflect on how things might go in the future. But such things are always luxuries.

My purpose then, tonight, is to set out my wares in the window, in the hope that one or more of the topics will interest you; and, in the further hope that you can be persuaded to return knowing, in rough outline, how the land will lie; and knowing that you will be expected, at the end, to take part in a discussion.

Each of the topics which I have chosen have one thing in common. It is that I have been involved, in practical terms, with each of them; and it is the experience which I have gained that I would wish to review and then to discuss with you.

Compensating the Victims of Violent Crime.

In 1977 I was invited by Merlyn Rees, the then Home Secretary, to join the Criminal Injuries Board. The Scheme for compensation had, by then, already been in operation for about 13 years; but it was, even in 1977, a fairly small-scale affair compared to what it has now become. Going back a little in time, it was felt, in the 1960s, that innocent victims of crimes of violence should be compensated from public funds. It was, I believe, put on two grounds. First, it was said that the State had failed in its duty to protect its citizens. Secondly, innocent people had been injured but they were without any significant prospect of financial recompense. It was therefore different from injuries sustained in road traffic accidents or at work.

On 1 August 1964 the original Scheme for Compensation was brought into operation. From the outset, the administration of the Scheme was ingenious. A few senior lawyers were appointed to the Criminal Injuries Board. Applications for compensation were invited from criminally injured persons. Enquiries were made of the police, hospitals, doctors and employers. The file was then submitted to <u>one</u> Member of the Board. He would make his decision on the material available; and the applicant would be informed of that decision. The high standing of the Member was such, that it was reasonably hoped that the Member's decision would generally be accepted. As a safety-valve, a dissatisfied applicant could ask for a decision to be reviewed by 3 members of the Board, sitting together. But that was exceptional; and it was never originally contemplated that the matter would go further than that.

The Scheme has now been in operation for over 28 years; and much has changed. There are now over 40 members of the Board, with a few hundred staff, attempting to contain a workload of over 50,000 new applications each year. The decision of the single member is still usually accepted; but, even so, the number of applicants who seek a hearing is significant. And the Courts have recognised a right judicially to review decisions of the Board.

The Scheme raises a number of questions for fruitful discussion. Let me give some examples. What is a "crime of violence"? In many cases it is obvious; but not always so. What of a dog that bites, but without being deliberately set upon the person bitten? What of a person who commits suicide by lying on a railway track, so causing the train-driver medical shock? What of the patient in a mental hospital who flails his or her arms? It is injuries which attract compensation.

Financial loss (subject to an upper limit) sustained as a result of the injuries is within the scheme; but no financial loss without injury. Restrictions are imposed on the right to recover compensation; but each gives rise to problems. Trivial claims have always been excluded. Normally, the incident must have been promptly reported to the police. There must be full co-operation with the police. The conduct of the applicant must not have been exceptionable. A serious criminal record can disqualify an applicant. These are all matters which I look forward to discussing with you at the beginning of December.

The Part-time Judiciary

There is a school of thought which maintains that Judicial Life should begin at, but not before, the age of 40. Before reaching that age I had spent my life, as a common-law practising barrister, both in London and on the Western Circuit. On my 40th birthday, almost to the day, I had a letter from the Chairman of Somerset Quarter Sessions. "Would I be willing" he asked "to become a Deputy Chairman of the County Quarter Sessions"?

Let me explain the background. For many centuries, serious crime had been tried at two levels. There were the "red judges", who came to try the really serious crimes: murder, rape. Then there were the borough and county quarter sessions, presided over by the old-style recorders and chairmen of quarter sessions, respectively. The work at the county sessions rarely took more than a few days; mostly pleas of guilty, with the occasional contested case. "Legally qualified" chairmen had been introduced in the 1930s. After the Second World War, and with the introduction of full legal aid, the work began to grow both in the number of cases to be tried and in the length of time it took to try them. By the time I was invited to sit in Somerset, there was a Chairman and four other Deputy Chairmen. And the court was in all-but continual session.

That was my own introduction to the part-time judiciary - an introduction shared by many others. There were far grander part-timers than I. A senior QC, who was being considered for appointment to the High Court Bench, might be invited to sit as a "Commissioner of Assize". Many senior barristers were Recorders of Borough Sessions; and they would often have Assistant Recorders to help them. Thus, there was a long and honourable history of barristers acting as part-time judges; but it was traditionally regarded as little more than a possible stepping-stone to higher things. It was often "a first foot on the ladder".

By the early 1970s the strain on the courts, in terms of workload, had become too great. The Courts Act of 1971 abolished Assizes and Quarter Sessions. The Crown Court took its place. Part-time judges became a significant feature of the judicial landscape. I became a Crown Court Recorder (new style), sitting part-time, more conveniently and (I have to say) with less sense of urgency, in Hampshire.

The High Court too, trying significant civil claims, had come under increasing pressure; and use was increasingly being made of barristers to sit as Deputy Judges in the High Court. I was authorised to sit both in the Queen's Bench and in the Family Divisions. Over the years, the practice of using part-timers has grown immeasurably. Plainly, there are advantages: It helps to contain the workload. It provides valuable experience. It is a chance to assess a person's capabilities. But there are also serious disadvantages: a person, who has a case deserving of trial by a High Court Judge, may reasonably expect it to be tried by such a judge, and not by a Deputy. Is it possible to justify the extent to which use is now being made of the part-time judiciary?

The issue has recently been addressed - and in forceful terms - by the present Chairman of the Bar.

These are the issues which I will hope to develop and discuss with you early next year.

The Ecclesiastical Courts

At about the same time that I had that letter from the Chairman of Somerset Sessions, another letter came, but this time from the saintly Oliver Tomkins, then Bishop of Bristol. He had to search for a new Chancellor for his Diocese. "Would I be interested"?

At the Norman Conquest, William the Conqueror set up a system of parallel jurisdiction; one for the church, the other for the state. The ancient jurisdiction of the Ecclesiastical Courts was wide. Not only did it cover purely "church" matters, it also included questions relating to marriage and divorce, to wills, probate and administration of estates, and to Libel and Defamation; and other matters.

It was only in the 19th century (for the most part) that much of that jurisdiction was transferred to the secular courts, leaving the Ecclesiastical Courts with the more limited "church" jurisdiction which they exercise today. For each diocese there is a judge - usually styled "Chancellor" - he is as much a judge as any other in this country. And he is the judge of the Consistory Court, which is as much a court of law as any other Court in this country.

Let me revert to Bristol for a few moments. The Diocese of Bristol has a fascinating history. Although Bristol was one of the greatest cities in Medieval England, it was not the seat of a bishop: Bristol was not one of the great medieval dioceses of England. The ancient diocese of Worcester stretched down to the Bristol Avon. To the south was the ancient diocese of Bath and Wells. Henry VIII devised a scheme to improve things. Broadly, his conception was that

the boundaries of a diocese should co-incide with those of a county: wholly admirable. As a result, in the 1540s, he caused several new dioceses to be created. Gloucester (to the north of Bristol) was one of them. But what of Bristol itself? Dorset was without a Cathedral Church or a diocese of its own. And so it came about: for about 300 years, the Diocese of Bristol comprised the City of Bristol and the detached County of Dorset - a most curious arrangement. Shifts in the population led to re-organisation in the 19th century. And this again affected the Diocese of Bristol. Bristol and Gloucester became united; and Dorset was sensibly joined to the Diocese of Salisbury. But even that arrangement did not last long. Towards the end of the late century, Bristol was once again given separate existence, but this time it was given a strip of land to the east, about 10 miles wide and 50 miles long.

A few months later, Bishop Mortimer of Exeter, asked me to take similar care of his Diocese. No such complicated story there. Once the see had been established in Exeter (as it was before the Conquest), the only geographical change came when it was stripped of Cornwall in 1877, to form the new Diocese of Truro. Exeter, as such, still comprises the whole of Devonshire, and so remains one of the largest dioceses in the country. Finally, and several years later, the new Diocese in Europe was formed out of the old Diocese of Gibraltar and the old jurisdiction of the Bishop of Fulham; and John Satterthwaite, its Bishop, asked me to be its first Chancellor. As such, it cares for the anglican communities in Europe, from Turkey to Tenerife, from Brussels to Biarritz; but, may I make it quite plain, I claim no jurisdiction over the Pope.

The role which the ecclesiastical courts continue to fulfil in England is an important one. Collectively, the ancient parish churches of this country form a highly significant part of our national heritage. Their care is still left, very largely, in the hands of the consistory court; and so of the church. Planning laws apply only in a limited way; "the ecclesiastical exemption" exempts churches from obtaining "listed building consent". The system, I believe, is a better one.

For each diocese there is a Diocesan Advisory Committee, which advises the Parish concerned and the Chancellor of the diocese; but ultimate responsibility lies with the Chancellor, exercising his jurisdiction in the Consistory Court. Some matters are dealt with by delegation by the Incumbent, others by Archdeacons; but ultimate control and responsibility rests with the Chancellor. There are suggestions for change. Some may be for the better; others perhaps not so. These, and related matters, I look forward to discussing with you in April.

Appellate Jurisdiction in the Channel Islands

Earlier this year, the judiciary in Jersey came into prominence in the UK, both in the press and on television and radio. It was said that the Deputy Bailiff had got behind with his work and that he had taken too long to deliver his judgements. I have no wish to enter into the rights and wrongs of that matter; but it raised constitutional issues of interest between the Island and the UK.

Let me go back in time, to before the Norman Conquest. The two Bailiwicks - the Bailiwick of Jersey, and the Bailiwick of Guernsey (which includes the islands of Alderney and Sark) - formed part of the Dukedom of Normandy at the time when William the Conqueror won the Battle of Hastings. By his conquest, he extended his jurisdiction (which already included the Channel Islands) to parts of what is now the United Kingdom. Since then, continental Normandy has been lost to the Crown; but Jersey and Guernsey have remained loyal. In one sense, then, the Channel Islands can justifiably claim to be the oldest part of the United Kingdom.

But, though united, each of the Islands has retained its own legislature and judicature. The Crown has its responsibilities - including its responsibilities for the appointment of each of the Island's senior officers - but the Islands have each retained a large measure of independence. The Courts of the Islands, each with a Royal Court presided over by the Bailiff (or his Deputy), sitting with Jurats, administer, not English law, but the law of each Island. Each of the Islands has a legal tradition founded on the ancient law of Normandy. More recently, English law has made a significant impact. But it is the law of each Island which the courts apply. And it would be quite wrong to assume that the law of Jersey is the same as the law of Guernsey: it is not. Nor is it to be assumed that the law of Guernsey is the same as the law of Alderney or of Sark: each may be different.

Until comparatively recently, the only possibility for an appeal from the Royal Court of each Island was to the Queen in Council - or, to put it in more recognisable terms, to the Judicial Committee of the Privy Council. And, with leave, that ultimate right of appeal is still available today (and is occasionally exercised). But in the 1930s, proposals were made for the establishment of a Court of Appeal for the Channel Islands: - an "intermediate" tier, where a litigant, dissatisfied with a decision of the Royal Court could go, in many cases "as of right", though in many cases only "with leave". The 1930s proposals came to nothing, partly, I suspect because of the Second World War; but, more likely, because what was proposed was a united "Court of Appeal for the Channel Islands"; and you do not need to have much experience of the Islands to learn one thing: although they may be united in defending their independence from English interference (and, no doubt, from any other outsider), they are united in little else. A recent take-over bid by a Jersey newspaper for one in Guernsey was as strenuously contested as any bid-battle here in England. But, if I am to be fair, a united "Channel TV" appears to be able to reflect the interests of <u>both</u> Islands.

Efforts to set up Courts of Appeal in each of the Islands were resumed after the Second World War. In 1961 statutory provision was made for a Court of Appeal for each Island. These Courts first sat in 1964; and they have continued to sit ever since. The judges appointed have, in the main, been practising Queen's Counsel, either from England or Scotland. I was appointed in 1978.

The work, which I will hope to be discussing with you in May, is as wide as it can be - from international tax avoidance to the petty criminal activities of holidaymakers. It is a fascinating jurisdiction.

The Takeover Panel

In 1989, I was appointed Chairman of the City Panel on Takeovers and Mergers. The Takeover Panel is the regulatory body which publishes and administers the Code on Takeovers and Mergers. The Code's central objective is to ensure "equality" of treatment and opportunity for all shareholders in takeover bids. The Code is designed to ensure good business standards and fairness to shareholders. The maintenance of orderly behaviour and fair dealing in the market are crucial to this.

Now, having outlined the purpose of the Code, and so of the Panel, let me at once point a distinction: that is to say, to point out what is not the concern of the Code or of the Panel. First, the commercial advantages or disadvantages of takeovers are not the concern of the Panel. Those are matters for the companies concerned and their shareholders (though the Panel is concerned that shareholders should be accurately and adequately informed, and in sufficient time, to allow them to assess the merits of any bid). Secondly, wider questions of public interest are not the concern of the Panel: they are the concern of governmental authorities, either within the United Kingdom (acting through the Office of Fair Trading and the Monopolies and Mergers Commission) and/or, in some circumstances, in the European Community (through the EC Commission).

How, then, did the Panel come into existence? In the 1960s there was mounting concern about unfair practices, which had featured in a number of controversial bids. As so often, if the City could not adequately regulate itself then there was the inevitable prospect of statutory regulation. The concept of the Panel was proposed by the then Governor of the Bank of England and the Chairman of the Stock Exchange. The Panel draws its membership from the major financial and business institutions, to ensure a spread of expertise in takeovers, in the securities markets, in industry and in commerce. The Panel has the support of the Bank of England. The Governor of the Bank appoints the Chairman, the two Deputy Chairmen and three members, each of whom is independent of any specific interest, save that two of the three are industrialists.

The essential characteristics of the Panel are, I believe, threefold: -its flexibility, to address situations, which are often fast-moving and complex, -its certainty, so that those who have to take business decisions based on rulings of the Panel can do so, confident that those rulings will not later be overturned, -and its speed, so that a ruling on a point of practice can be given, if not immediately, then within no more than a few hours, and, only exceptionally, after a lapse of a very few days. It is important that these essential characteristics should be retained. Litigation in the Courts, which might well be of a purely tactical nature, could so easily frustrate the ability of shareholders to decide the outcome of an offer.

Compliance with the Code, and with rulings of the Panel, have never been a problem. The Jurisdiction of the Panel is not questioned. Compliance with the Code, and with rulings of the Panel, is ensured in a number of ways. In essence, compliance derives from the fact that those organisations represented on the Panel recognise that, together, they constitute the domestic securities markets in

the United Kingdom, and so should be bound by the Code and rulings of the Panel. But there are additional safeguards. First, public companies and their advisers know that the Panel can, and will (if necessary), issue critical public statements. Secondly, financial institutions can be required to "cold-shoulder" any company considered unlikely to comply with Panel rulings; and this obligation is enforceable through the statutory regulators set up under the Financial Services Act. Thirdly, those who deal in the securities markets are at risk: if they breach Panel rulings, they may be considered no longer "fit and proper" to be authorised under the Act to carry on investment business.

Thus far I have spoken only of "The Panel". The day-to-day work of the Panel is carried out by its Executive, a small distinguished group of merchant bankers, lawyers, accountants, stock brokers and civil servants, headed by a Director General.

In June I will be looking with you at the way in which the Panel operates, the challenges which the Panel presently faces, and what the future may hold.

GRESHAM COLLEGE

"COMPENSATING THE VICTIMS OF VIOLENT CRIME": TUESDAY, 1 DECEMBER 1992

SIR DAVID CALCUTT

The thrust of this year's law lectures is to reflect practical experience gained over many years from a wide range of discrete topics; and to raise, for discussion with you, some of the features of them which seem to me to be worthy of your consideration.

Today I shall be considering the arrangements for the compensation of the victims of violent crime in England, Wales and Scotland, as they stand today. There are plans for change. In the 1960s, it was felt that innocent victims of crimes of violence should be compensated from public funds. As I suggested to you in October, the basis was, I believe, put on two grounds. First, it was said that the State had failed in its duty to protect its citizens. Secondly, innocent people had been injured, but they were without any significant prospect of financial recompense.

And so it was, on 1 August 1964, the original Scheme for compensation was brought into operation. The Scheme has, since 1964, been modified in a number of respects, but the current Scheme is easily identifiable with its progenitor; and, in addressing you, I shall refer to it simply as "The Scheme". It is remarkable in a number of respects. As Professor Wade has pointed out in his Administrative Law: "It was first constituted merely administratively to make what in law were ex gratia payments out of funds put at its disposal by Parliament. The published scheme contained rules for the board's determination of claims, and these rules were debated in Parliament and amended by the Home Secretary. The rules were therefore mere administrative instructions from the Home Secretary to the Board made under no statutory authority".

There was another unusual aspect. I am no admirer of black-letter statute law. But the Criminal Injuries Compensation Scheme leaves still more to be desired when it comes to interpretation; and it is perhaps not surprising that the Scheme itself has had to be supplemented by a "Guide" to the Scheme. "The Guide", it is said "is an aid and not a substitute for the Scheme itself and cannot cover every situation; each case is determined by the Board on its own merits and solely in accordance with the relevant provisions of the Scheme.... While the Guide should enable most applications to be made without assistance, there will be some cases in which applicants may have to think carefully whether to obtain the services of a solicitor or other adviser first". So the Guide throws you back to the Scheme; and the Scheme is in several respects unclear as to its true meaning.

Let me deal with some of the principal features of the Scheme and the issues which often arise. First, there must be "personal injury". Provided there is "personal injury", then there can be compensation for such financial loss (within prescribed limits) as may flow from that crime of violence; but unless there is "personal injury", the Scheme cannot assist. A man who has his wallet pick-pocketed, but who suffers no injury (unless there is medical shock), can claim no

compensation under the Scheme. Still less can a victim of fraud. Why is this distinction made? There is, perhaps, no obvious answer. But perhaps it marked the reversal of an earlier attitude, which prevailed throughout the 19th Century, that property mattered more than person. Secondly, the "personal injury" must be "directly attributable" "to a crime of violence" or "to the apprehension or attempted apprehension of an offender or a suspected offender or to the prevention or attempted prevention of an offence or to the giving of help to any constable who is engaged in any such activity"; and there is a further class of victim whom I will mention briefly in a few moments. There must, therefore, be "a crime of violence" which is causally linked with the "personal injury".

This raises a number of interesting problems. What is "a crime of violence"? In many cases there will be no difficulty. An assault which takes the form of a blow with a hammer to the head is plainly a crime of violence. But there are other cases which are less clear. Arson and poisoning might have raised interesting questions, had it not been specifically provided in the Scheme that a crime of violence "included arson and poisoning". But what, for example, of the dog that bites a human (whether or not it had previously bitten), when that dog has not been deliberately set upon the person who is bitten? If it is a crime, what is the offence? But, more importantly, is it "a crime of violence"?

There was, for many years, a problem posed by a suicide who took his life by lying on the track of an oncoming railway train, often causing medical shock to the driver of that train. The suicide might well have been trespassing on the railway, and this might have been in breach of by-laws; but was his crime a "crime of violence"? The difficulty has now been substantially cured by including, as a category of persons entitled to compensation, "personal injury directly attributable to an offence of trespass on a railway"; but it cannot be long before a suicide chooses to take his life by lying down on an un-manned railway crossing - so that there may be no trespass. What then?

Sexual offences often give rise to particular problems. An indecent assault must, as a matter of law, be "an assault", albeit of a specialised kind, and so a "crime of violence"; but what may be an indecent assault on a young person (who may be deemed incapable of consenting) may, in a slightly older person, amount to no more than gross indecency; and it would be difficult to contend that that was a "crime of violence".

Similarly a young girl may be incapable, in the eyes of the law, of consenting to sexual intercourse, so that the offender is guilty of rape; and it would be difficult to contend that that was anything other than a crime of violence; but, with increasing age, the law recognises that although sexual intercourse with a person under-age may be a criminal offence, if actual consent is given, it may be sufficient to negative rape; and it would be difficult to contend that that was a "crime of violence".

For the purposes of the Scheme, it is not necessary that there should have been a conviction, or even a prosecution, for the crime

in question. In many cases the offender is never traced, and the Board has to do the best it can to infer what must have happened; in other cases there may not have been a prosecution because the prosecuting authority took the view that it could not prove its case beyond reasonable doubt: the test which the Board applies is the lower test of a "balance of probabilities". It may be that although there has been conviction for a particular non-violent offence, the underlying facts may also give rise to a crime which can properly be categorised as a "crime of violence".

In this connection I ought, perhaps, to dwell briefly on the causal connection between the "personal injury", and the "crime of violence". Over the years lawyers have spent much time considering various aspects of causal connection, and have, thereby, become involved in tests such as "reasonable forseeability", "remoteness", and so forth. The test - and the only test - which the Board applies is whether or not the personal injury is "directly attributable" to the crime of violence. If anything can be plain in this difficult area, some meaning must be given to the word "directly": if it is merely "attributable", but not directly so, then the causal link is not sufficiently close. It is a question of fact and judgement in each case.

I have already pointed out that "a crime of violence" is not the only circumstance in which compensation can be awarded: personal injury directly attributable to the apprehension of an offender, or to the prevention of an offence, or the giving of help to a constable may each be sufficient to support an award of compensation; but where these circumstances arise, there is usually a further requirement which needs to be satisfied. If, in these cases, the injury was sustained accidentally - and it usually was - then the Board has to be satisfied that the applicant was, at the time, taking "an exceptional risk, which was justified in all the circumstances".

Applying this test is, in my experience, exceedingly difficult. What risk of injury do people take which is only an "ordinary" risk rather than an "exceptional" risk? And what exceptional risks are justified and which are not? Let me give an example. Take a policeman who spots a burglar, and gives chase. What if he trips on an uneven paving stone and injures himself? In giving chase, was he taking "an exceptional risk" or was he merely taking an ordinary risk. Is a risk which may be an "exceptional risk" for a civilian, merely an "ordinary risk" for a policeman? And so the problems multiply.

There are several bars - or partial bars - to compensation. First of all, there is a financial "low-limit", below which no compensation at all may be paid; but it is better that I should consider this when I come to deal with the basis on which compensation is assessed. Secondly, however, it is a requirement of the Scheme that the applicant has taken, without delay, all reasonable steps to inform the police of the circumstances of the injury.

This raises two separate points. Reporting is the only real check which the Scheme contains to protect public funds from fraudulent claims: it would be so easy for a half-drunk, who falls in the street, simply to claim that his injuries were due to a criminal assault. Reporting gives the police the chance to investigate not

only the genuineness of any claim, but also the circumstances in which it is said to have occurred. But, inevitably, there are many situations where an applicant cannot be expected to have informed the police of the incident. He may be too severely injured: he may be unconscious and in hospital. At the other end of the scale, he may have thought at the time that the incident was too trivial, and only later did the seriousness of his injury become apparent. A parent may be unwilling to allow his (or her) child to report an incident to the police; and the sins of the parent cannot be visited on the child. It often happens, even without the applicant informing the police, that the police learn of the incident; and there is a prosecution, leading to a conviction. In these circumstances it is usually unreal to hold the failure of reporting against an applicant.

Thirdly, not only must there be an informing of the police, but, thereafter, there must be full co-operation with the police in bringing the offender to justice. Again this is an important provision of the Scheme. There may be cases where the police are not unduly concerned one way or the other whether an offender is prosecuted to conviction; but there will be other (perhaps more serious) cases, where the police will wish to prosecute, but cannot do so unless they have the full co-operation of the victim. Hard though it may sometimes seem, a person assaulted, who is unwilling to go through the trauma of giving evidence in court, cannot usually also expect to obtain compensation from public funds. There may be exceptional cases, where the terror is overwhelming, but they are rare.

Fourthly, and not very surprisingly, an applicant must give all reasonable assistance to the Board. This is not a provision which often arises in practice: an applicant who fails to give reasonable assistance to the Board is usually an applicant who has lost interest in the case, and it becomes abandoned.

Fifthly, the Board must have regard to the conduct of the applicant before, during or after the events giving rise to the claim. This again, is an important provision of the Scheme. A man who, by his conduct, provokes violence cannot sensibly complain if he is thereafter assaulted; and it often happens that a provoking person gets more than he bargained for: that is his misfortune. A man who challenges another outside a pub to a "square go", perhaps with no more than fisticuffs in mind, cannot usually complain if, unexpectedly, his assailant produces a knife. Similarly, a man who is assaulted, but who subsequently takes the law into his own hands and exacts his own retribution cannot also claim compensation from public funds. Finally, if the character of the applicant, as shown by his criminal convictions or unlawful conduct, is grave, he may be denied compensation - or at least full compensation.

It is perhaps this provision of the Scheme, more than any other, which is most commonly misunderstood. The problem can be put quite simply. Should a man who has regularly been convicted of serious assaults on others (and in respect of whom, no doubt, compensation has been paid), should he be entitled to receive compensation, when the tables are turned, and he happens, for once, to be on the receiving end. "But" he will say, "I have already been punished for what I did. That has nothing to do with this assault, for which I am claiming compensation". In one sense he has a point. He may, for

example, have been told on his last appearance before a crimimal court, and if he was placed on probation, that if he "went straight", "he would hear no more about his conviction" - and that is true, unless he happened himself to be criminally assaulted, and makes a claim on the Criminal Injuries Compensation Board.

The Board acts in the way which it believes most sensible law-abiding citizens would wish it to act. If, at one end of the scale, there was a moderately serious criminal conviction, but it was many years ago, and there had been no further criminal conviction, then most right-minded thinking people would believe it right to overlook the earlier lapse. Similarly, if there have been a number of convictions (including recent convictions) but they are all of a trivial kind, then again the right course may well be to overlook them.

But at the other end of the scale, what of the professional burglar, who might never have resorted to physical violence, but who has caused his many victims untold misery, worry and inconvenience? What if he should happen to be criminally injured on one isolated occasion?

Take a yet more extreme example. What of a terrorist, who has been convicted of causing explosions in public places, and so causing death and physical mutilation, what if he should happen on an isolated occasion to be criminally injured? Would any right-minded law-abiding citizen think that he should receive compensation from public funds? It is a difficult area, and very much one of degree; but, for myself, I have no doubt that some provision such as this is necessary.

I now turn to consider the basis on which compensation is assessed. First, there has always been (as I mentioned a few moments ago) a "low limit". Compensation has to be assessed on the basis of common law damages - i.e., on the same basis as they would be assessed if the claim were made for damages in the civil courts. Using this yard-stick, the "low limit" was, in 1964, put at £50:00. If, on a common law assessment of the claim, a court would then have awarded less than £50:00, then no compensation at all was payable under the Scheme. The purpose was to compensate only those who were comparatively seriously injured, to avoid cluttering up the Scheme with trivial cases. The "low limit" has been increased over the years, and now stands at £1,000. First it was increased to £150:00, then to £250:00, later to £400:00, then to £550:00, more recently to £750:00, and as from an early date in January 1992 to £1,000. Our purpose was, of course, to keep up with inflation. But it has also to be said that there appears also to have been an intention to limit the ever-increasing costs of the Scheme on the public purse. It was probably right that compensation under the Scheme should be reserved for the more serious criminal injuries, leaving the trivial cases to be handled by way of an order for compensation made by the magistrates against the offender, in cases where this was practicable. So much for the "low limit".

There is no "upper limit" on the level of compensation for pain, suffering, and loss of amenity; and it is probably right that there should be none. Only a comparatively few cases seem to attract the really high awards - perhaps because of the circumstances in which

most criminal injuries occur - but where they do, then it would be sad indeed if those injured were not adequately compensated. High awards usually reflect such items as the high cost of nursing services or rehabilitation in alternative and specially-constructed accommodation.

But there is, in one respect, a high-level cut-off. In so far as a claim contains a claim for loss of earnings or earning capacity, then the rate of compensation is limited so that it shall not exceed one-and-a-half times the gross average industrial earnings at the date of assessment; and in the case of high-earners this does have a significantly limiting effect.

There is a further broad principle involved in assessing compensation. There is an underlying principle that an injured person shall not be compensated twice-over for his injuries. If an injured person has, as the result of his injury, received United Kingdom Social Security Benefits, then compensation must be reduced to take account of the full value of those benefits, both to date and for the future. Similarly, if compensation orders have been made by criminal courts, and those orders successfully enforced, so that the injured person has received compensation from the criminal, then again a full deduction must be made. Similar payments from other countries have also to be taken into account.

I should, perhaps, add one word about the "common law" basis of compensation. It is right, in my view, that compensation should be awarded according to the way in which any injuries affect any particular injured person, rather than on a crude tariff basis: the loss of the last digit of a little finger is of far greater consequence to a concert pianist than it is to most of us. There is, however, some virtue of having a tariff in mind, if only to achieve some sort of uniformity between the various awards which have to be made, and provided the tariff is used as no more than a "thinking point" from which to start.

There is one curiosity which has arisen over the years. The principle proclaimed in the Scheme is that awards made by the Board should follow those made by the Courts. But it is the fact that, with applications to the Board increasing year-by-year, and many of those decisions being reported in legal journals, some Courts are now following the Board, rather than the other way round. So it has become somewhat circuitous.

Finally, I want to say a word about the way in which the Scheme is administered. In my view, the flexibility of the Scheme, and the way in which it is operated, is one of the more remarkable achievements in the legal (or quasi-legal) fields of the last few years. From the outset, the way in which the Scheme operated was imaginative. A few senior lawyers were appointed to the Board. Applications for compensation were invited from criminally-injured persons. Once the application had been made, enquiries were made of the police, hospitals, doctors and employers; the file was then submitted to one member of the Board. It was his duty to make a decision on such material as was (or could be made) available to him. It was not expected that he would or should be able to resolve every issue of fact. On the contrary, it was understood that he would use his experience and good sense to arrive at a proper decision in each case.

The standing of the member was such that it was reasonably - and in my view very sensibly - hoped that the single member's decision would generally be accepted. Cases were prepared by the Board's staff; but any decisions which needed to be taken were taken by Members of the Board.

In recent years there has been pressure on the Board to delegate some decisions to members of the staff. Understandably, perhaps, there has been some delegation; but I respectfully believe that this strikes at the fundamental concept on which the administration of the Scheme was based. And matters have not been helped by another factor. Although it was hoped and reasonably expected that the single Member's decision would generally be accepted, provision was made, as a safety valve, that a dissatisified applicant could ask for a decision of a single member to be reviewed by three Board Members, sitting together. It was contemplated that resort would not often be had to 3-member "hearings"; and I believe that in the early years such "hearings" were indeed a rarity. But, as the years have passed, there have been an increasing number of hearings before three members - sometimes called, but wrongly called, "appeals"; and, it must be conceded that for whatever reason - often fresh evidence - a substantial number of hearings have resulted in decisions which are more favourable to an applicant than the decision which had been taken by the Single Member.

There are really only three restraining factors to prevent all applicants for compensation from asking for a hearing. First, there is the inevitable hassle involved in preparing for a hearing, and going to a hearing centre. Secondly, there may be expense involved to an applicant; and there is no legal aid at a hearing. Thirdly, there is, regrettably, considerable delay before hearings can take place. Very recently the Scheme has been amended so that an applicant is not entitled, as of right, to a hearing in every case; and this may go some way to help to redress the balance.

I mentioned the flexibility of the Scheme. Normally, awards of compensation take the form of one single lump-sum payment; but that need not necessarily be so, and in many cases is not so. In many cases interim awards are made, and often, in difficult cases, several interim awards. This is particularly helpful in cases where the medical prognosis is uncertain. In this respect it is different from an award of damages in a court: there is no "defendant" who needs to know the extent of his civil liability. Again, there are provisions for re-considering awards which have been made, where there has been a serious change in the applicant's medical condition; and again, on a re-consideration, there can be one or more interim awards, before finality is reached.

Finally, the procedure adopted at hearings is highly flexible. There are no set procedures, and the procedure followed in any particular case can be tailored to meet the particular needs of that case. Evidence is not restricted to the kind of evidence which is admissible in a court. The Board is entitled to and does take into account any relevant hearsay, opinion or written evidence, quite regardless of whether or not the author gives oral evidence at the hearing. There is no argument about "admissibility": the sole issue is as to what weight should properly be given to that evidence.

When I joined the Criminal Injuries Compensation Board, in 1977, the Scheme had already, by then, been in operation for about 13 years; but it was, even then, a fairly small-scale affair, compared to what it has now become. There are now over 40 members of the Board, between them handling a work load of well over 50,000 applications each year. It is inevitable that, with this work load, there have, from time to time, been delays; but I believe that this Scheme has been a remarkably successful and innovative venture, and one of which we are all entitled to be proud.

GRESHAM COLLEGE

"THE PART-TIME JUDICIARY": WEDNESDAY 24 FEBRUARY 1993

SIR DAVID CALCUTT

In this lecture I shall be considering specifically a peculiarly English institution: The Part-Time Judiciary. It is peculiar, I think, for three particular reasons.

First, it has always struck some of our European colleagues, with their experience of a career judiciary, as odd that our Judiciary should be chosen from the ranks of those who have so far spent most of their professional lives as advocates, arguing their client's case; but who then, as it were, turn their wig around, and become the impartial judge between the opposing parties.

Secondly, because it may, perhaps, seem even stranger that we should have a "part-time" judiciary, who may spend part of their working year as an advocate, with the partial role I have just described, and part of it as the impartial judge.

Thirdly, because, in recent years, a significantly increased use has been made of "part-timers", so that they have now become very much an accepted part of the judicial landscape. The part-time judiciary has, as I shall show in a moment, a long and honourable history; but it has traditionally been regarded as little more than a possible stepping-stone to higher things. Times have changed, and, so too has the role of the part-time judiciary.

Let me, first, define my terms. By the "part-time" judiciary, I intend to mean "A person who is principally engaged in some occupation other than that of a judge, but who, for a few weeks in each year, acts as a judge". Typically, such a person will be someone whose regular occupation is that of a practising barrister or solicitor or, perhaps, an academic lawyer; but it does not have to be such a person, provided always that he is "legally qualified".

There are three categories of "part-timers", who might reasonably be so regarded, but who, for my present purposes, I intend to exclude. First, there are the judges of those courts, where the courts themselves are not in continuous session. The judges are "part-time" judges, only because the courts themselves are "part-time". As I shall shortly demonstrate, such judges played an important part in the development of the notion of a part-time judiciary; but, with things as they are today, they are not to my present purpose. Secondly, there are those judges who may regularly be judges of one court, but who, from time-to-time, sit "part-time" in another court. Thus, a Circuit Judge is sometimes asked to sit in the High Court, and so exercises the jurisdiction of a High Court Judge. But, he (or she) is a full-time judge. Again, I exclude them from my present consideration. Thirdly, there are those judges who have retired, but who are invited to return, from time-to-time to sit, on a "part-time" basis. For better or worse - and I say no more about it today - this is a practice which has frequently been adopted in recent years in the Court of Appeal.

When I opened this series of Lectures in Law to you, I promised that each lecture would be based simply and solely on such practical experience and personal reflections as I have had; and I intend to keep that promise today. But it might be as well to see how things have come to be as they are, before considering the position as it exists today.

Let me begin by saying something about the trial of criminal cases. For many centuries, serious crime had been tried at two distinct levels. First, there were the "Red Judges" - that is to say the judges of the Queen's Bench Division - who, either in London or out on circuit, tried the really serious criminal cases - the murders, the rapes, and so forth. Then at a lower level, trying the less serious cases, there were the Quarter Sessions, held either in the boroughs or the counties, presided over either by Recorders (in the case of the boroughs) or by Chairmen (in the case of the counties). They tended to sit during the law vacations. Recorders had not always been "legally qualified" but, in more recent years, they were, and were often senior practising barristers. Similarly, Chairmen of Quarter Sessions had not always been "legally qualified"; but, again, in more recent years, it was the practice, and later the law, for chairmen to be "legally qualified". In some cases they might be practising barristers, but often they would be serving judges (sitting during their vacations) or sometimes retired judges.

The work at Quarter Sessions, whether in a borough or in the county, had traditionally lasted no more than a few days, so that the courts themselves - and therefore their judges - were inevitably "part-time". After the Second World War, and with the introduction of full legal aid, the work began to grow, both in the number of cases to be tried, and in the length of time which it took to try them. In many boroughs and county quarter sessions, although there were still nominal "quarter" and "intermediate" sessions, the courts came to sit in all-but continual session; but the "part-time" nature of its judiciary continued. This development was later to become significant.

So far, I have spoken only of criminal work. The High Court Judges who came out on circuit, dealt not only with the serious criminal work, but also with the significant civil work. They were, from time to time, assisted in their work by Commissioners of Assize. A senior Queen's Counsel, who was being considered for appointment to the full-time High Court Bench, might be invited to sit as a Commissioner. He would help, as need was required, either with the criminal work, or with the civil. Thus a Commissioner was a part-time judge.

By the 1960s the disposal of the work at Assizes and Quarter Sessions had reached a precarious situation. Accordingly, in 1966, a Royal Commission was set up "to enquire into the present arrangements for the administration of justice at Assizes and at Quarter Sessions outside Greater London, to report what reforms should be made for the more convenient, economic, and efficient disposal of the civil and criminal business at present dealt with by those courts, and to consider and report on the effect these will have on the High Court, the Central Criminal Court, the Courts of Quarter Sessions in Greater London and the County Courts throughout England and Wales". The Royal Commission, chaired by Lord Beeching, worked from 1966 until 1969,

reporting in September of that year. It was inevitable that the part played by the part-time judiciary should be considered by that Royal Commission.

The Commission first considered the position of Commissioners of Assize, and reported in these terms:

> "When serious overloading of Assizes becomes apparent, it may be possible for additional High Court Judges to be sent from London to relieve the lists in a few places, but only at the expense of the High Court in London, which is itself continuously overloaded. Frequent resort is had, therefore, to the other method of providing judge power, which is to appoint Queen's Counsel, and sometimes County Court Judges, as Commissioners. Because this is obviously a stop-gap procedure, it has led to criticism that second-rate justice is dispensed thereby. Though it is admitted that much of the civil and criminal work done by High Court Judges could well be done by judges at a lower level, it is not always easy to select cases to be taken by Commissioners, who are given full High Court jurisdiction on their appointment ad hoc".

The Royal Commission then looked specifically at Quarter Sessions, and at the use made of part-time judges. Let me quote, selectively, from that part of the Report which dealt with this particular matter. It is instructive.

> "The part-time use of suitably qualified lawyers as Quarter Sessions Judges undoubtedly has some advantages. The main arguments for it are that it provides a flexible source of judicial capacity to meet the fluctuating demands at a very considerable number of court locations; that it makes available a good deal of high judicial potential which it might be difficult to match by permanent appointments; and that it provides a valuable means of giving judicial experience to successful practising members of the Bar, which both develops their talents and facilitates the Lord Chancellor's selection of new High Court Judges..... On the other hand, there can be no doubt that dependence on the part-time services of lawyers who are very busy with their own practice, who frequently arrange sittings to suit their own convenience, and who can seldom sit for long at any one time, does cause bunching on court sittings, with resulting overloading of the Bar and of others, who provide services to a group of courts. It also causes the trial of cases to be postponed and sometimes transferred unnecessarily, either to Assizes or to another court of Quarter Sessions..... There are nearly 400 part-time posts, held by over 300 people, some of whom sit for very short periods, which makes it difficult to establish reasonable consistency in sentencing. We know that this is a problem which causes the Lord Chief Justice considerable concern".

And then the Report considered some of the more detailed effects of the system which was then in operation, but with which I do not propose to trouble you.

The conclusion of the Royal Commission is worthy of your attention. It was this:

> "For reasons which we (have) discussed... namely that the predominant use of part-time judges for a large part of the work of the higher criminal courts is incompatible with an orderly sequence of court sittings within an area, and militates against consistency in sentencing, we decided that, for the most part, the courts ought to be served by full-time judges. Nevertheless, we had regard to two important counter arguments. The first, which was advanced by a number of witnesses, was that part-time appointments made it possible to use the judicial talent of successful counsel who might not be prepared to give up private practice to serve as full-time judges below High Court level. The second was that the abolition of such part-time appointments would not only diminish the judicial quality immediately available, but would also have an adverse effect on the selection of judges for the High Court bench by removing the possibility of developing and assessing the judicial talent of potential candidates before appointing them".

The Royal Commission thus recommended, in addition to the full-time bench, a new corps of part-time judges who should be known as new-style Recorders. The proposal was made that the part-time appointments should be made from men of high professional standards who were prepared to commit themselves to a total of, say, not less than one month's work on the bench each year, at time or times to be fixed in advance.

The Royal Commission thus recognised the possibility of servicing (in part) a court, which was itself in continuous session, with judges who would themselves be no more than part-time; but this did no more than to give recognition to what had happened de facto. But the Royal Commission also recognised the fact that a barrister, who might not be willing to give up private practice to serve on as a full-time judge, might nevertheless be willing to serve part-time, and on a permanent part-time basis, effectively until he reached retiring age. These were important factors in the development of the modern part-time judiciary.

And so, it was on this basis that the Courts Act, 1971, gave substantial effect to the recommendations of the Royal Commission. The Bar Council had to consider the practical implication of the new arrangements, and I mention one particular matter which caused concern. Under the arrangements which had existed until 1971, a barrister who accepted appointment either as the Recorder of a Borough (or as an Assistant Recorder) or who accepted appointment as a Chairman (ot Deputy Chairman) of a County Quarter Sessions had necessarily to undertake no longer to practice as a barrister in those courts. He was the player turned referee; or, as it was sometimes said, the poacher turned game-keeper.

The practical problem which arose under the post-1971 arrangements was that the new-style Recorders would have no affiliation with any particular court by virtue of their judicial appointment. Was it proper for a barrister to appear in court, as

an advocate, on Friday; but on the following Monday morning to appear at that very same court as the judge of that court? The jury, who might have been summoned for several weeks' jury service, might, to put it mildly, think it somewhat odd. Equally, if the barrister appeared on the Friday as a judge, summing-up in a case and sentencing a prisoner, it might be thought odd if he appeared in that self-same court on the following Monday morning, but now as an advocate. Again, a jury might, so it was thought, perhaps give undue weight to his submissions, as compared with those of his opponent.

The Bar Council decided that there should be a period of quarantine, so that the difficulties which I have just mentioned could be avoided. In the result, I believe, good sense has prevailed and care is taken to ensure that the embarrassment of the kind which I have mentioned does not occur. This can frequently be resolved by barristers sitting as judges in a different part of the country from that in which they normally practice as advocates.

Let me move on now from 1971. As you will know only too well, the workload of the courts has continued to increase over the last twenty years, and it has been a continuing problem for the Lord Chancellor's Department to know how best to handle that workload. Concern has arisen about the process for the selection of candidates for professional judicial appointments. But it is no part of my purpose today to consider that particular problem. In 1990, the Lord Chancellor's Department produced the latest edition of a pamphlet entitled "Judicial Appointments"; and a significant part of that pamphlet reviewed the position of part-time appointments in the Courts; and that is to my purpose today.

It sets out, if you like, the present official view of the part-time judiciary. Let me quote, again selectively, from the relevant part of that pamphlet:

> "There are two main reasons", it reads "for part-time appointments. One is to assist with the work of the courts. The other is to give possible candidates for full-time appointment the experience of sitting judicially and an opportunity to establish their suitability. There are requirements as to the number of days to be sat each year. The detailed requirements may vary from one type of work to another. There is normally an overall maximum of 50 days in one or more capacities, because a longer period could have an adverse effect on a professional practice".

And then the pamphlet looked at each of the categories of part-time appointment; and it is, perhaps, significant that the categories had themselves increased in number by that time, and they had been formalised in the way they were presented, and in what was said about each of them. The part-time judiciary had become, if you like, an even more established part of the judicial landscape.

Let me take, first, Deputy High Court Judges. As the pamphlet explains, the Supreme Court Act, 1981, provided for the appointment of Deputy High Court Judges. Such judges were appointed, from time to time, as the needs of the High Court dictated. I quote briefly from the pamphlet. "The appointments are by invitation only and are made by the Lord Chancellor, in consultation with the Head of the appropriate division of the High Court from among the ranks of the

most experienced and able practitioners. Deputy High Court Judges are not asked to sit for a fixed period each year". "Most practitioners appointed to the High Court Bench will be expected to have served as Deputy High Court Judges, though it does not follow that all Deputies can expect to become High Court Judges. It is becoming more usual for the Lord Chancellor to select Deputy High Court Judges from among those who are already Recorders". Thus it can be seen that the official view, in general terms, is that there is to be a stepping-stone progression - from Recorder to Deputy High Court Judge, and from Deputy High Court Judge to a full-time appointment on the High Court Bench.

The pamphlet went on to deal with the position of Recorders. "Recorders are appointed by The Queen on the recommendation of the Lord Chancellor..... normally for a period of three years.... Although no Recorder has any right or guarantee of renewal, provided a Recorder's judicial performance is satisfactory and the terms of the appointment are observed, the appointment will normally be renewed until the Recorder reaches the age of 72".

The pamphlet then goes on to review the position of Assistant Recorders. It explains that an Assistant Recorder is authorised by the Lord Chancellor to sit in the Crown Court and in the County Courts, but for a limited period of time. It is explained that it is expected that after about three to five years an Assistant Recorder will have progressed to a full Recordership, but that if this has not happened by the end of that period, the appointment comes to an end, and will not be renewed. Thus an Assistant Recorder is a first-step on the route which may lead to a Recordership and, possibly, to higher things. But, for my purposes, it is important to emphasise that this is yet another addition to the established part-time judiciary.

There are other part-time appointments - Deputy District Judges, Deputy Supreme Court Masters and Registrars, Deputy District Judges of the Family Division, and Acting Stipendiary Magistrates. Again, I do not propose to trouble you with the details; but simply to point out that the ranks of the part-time judiciary have not only been considerably increased in recent years, but that they now form a significant and recognised feature of the judicial landscape. That, I hope, gives you some outline of the position as it has grown up over the years, and as it now exists today.

Let me now say, in fulfilment of my promise, a few words about my own involvement in all of this. Fortunately, I have some experience both under the pre-1971 position and under the arrangements as they existed after 1971, both in the Crown Court and in the High Court. There used to be a school of thought which maintained that any form of Judicial Life should not begin before the age of 40 - though I notice that that age has now been marginally reduced. Before reaching the age of 40 I had spent most of my life, as a common-law practising barrister, both in London and on the Western Circuit. On my 40th birthday, almost to the day, I received a letter from the then Chairman of the old Somerset Quarter Sessions. "Would I be willing to be considered" he asked "to being appointed as one of the Deputy Chairmen of the County Quarter Sessions?" In those days it was very much a first-step-on-the-ladder, and, not very surprisingly, I

accepted the offer. I joined the ranks of a remarkably wide range of part-time deputy chairmen of Somerset Quarter Sessions. The Chairman himself was a full-time County Court Judge who regularly sat in Somerset. He was supported by a retired Colonial Judge, by a retired High Court Judge, and by a couple of practising barristers. Together we attempted to contain the ever-increasing work-load in the County; and although, as I have explained, the Sessions were intended to be held quarterly, Intermediate Quarter Sessions had been introduced, and the Court (as a court) was in all-but continual session.

The appointment brought to an end my practice as an advocate in the Courts of Quarter Sessions in the County. But, having practised there for several years, there was the advantage that I (in common with others) knew the ways of the County fairly well; and I would like to think that, in my newly-elevated state, I continued to enjoy the confidence of those advocates who had, until very recently, been my opponents. It was, if you like, an in-built advantage of the system as it then existed.

The work of the Court was unremarkable. There was the mix, as you might expect, of criminal work, typical in any county which has some lightly concentrated centres of population, but which is for the most part still a rural county. For better or worse, when drink-driving was still measured by its effect upon the driver, it was difficult to persuade a jury of farmers that any intake of beer which fell short of pints in double figures should ever result in a conviction. Times have changed, perhaps for the better.

Under the new arrangements, which came into effect at the beginning of January 1972, I became a new-style Recorder. Sitting, more conveniently, and (Ihave to say) with less sense of urgency, I made Southampton my base. Sitting in the Crown Court there, one had all the interest which comes from the work which flows through one of the great ports of the country. Unlawful importing and exporting, drug-related matters, and so forth, were very much part of the criminal calendar. There was nothing unusual in sitting with the depositions to one side of the bench, and a map of Algeria, or perhaps of Turkey, to the other. One of the qualities which any judge needs is the right response to an unusual combination of circumstances and to come up with it immediately. Long shall I remember being told that a foreign national, who spoke no English, wished to make an application for a summons to call a witness who was resident abroad. It was suspected that he was mentally defective, but that he insisted on representing himself. As I hope to make plain, the work at Southampton was full of interest.

Then, there came the opportunity to sit as a Deputy High Court Judge in London, and I was authorised to sit both in the Queen's Bench and in the Family Division. I would like to think that I was one of the last to hear out a long-contested matrimonial dispute, with each and every allegation of alleged cruelty being investigated in remarkable detail. More colourfully, perhaps, I acquired what might be called a Christmas-Eve practice. Because one parent or other thought that the courts might not be readily available, in two consecutive years, a father in one case, and a mother in another, tried to take a child out of the jurisdiction of the English Courts, by air, on Christmas Eve. I was on duty on each occasion, and had to decide whether or not to grant, ex parte, an injunction to stop an

international flight from leaving Heathrow. I was just thankful that I did not myself have to witness the frustration of all the other passengers.

Let me now move, if I may, to make some assessment of the advantages and disadvantages, as I see them, of the increased use of the part-time judiciary. Plainly, as I have already indicated, there are advantages:

-It helps to contain the workload
-It provides valuable experience
-It is a chance to assess a person's capability
-It is also a source of interest to the person appointed
-It can also provide him (or her) with added variety in his overall workload throughout the year

But there are also disadvantages. Fundamental to the proper functioning of a strong Judiciary is its independence. As Article 6 of the European Convention on Human Rights puts it:

> "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Judicial independence requires that judges be protected from Governmental and other pressures in order that they may try cases fairly and impartially. A Judge who holds a full-time appointment is protected against arbitrary decisions which may be taken about the way in which he performs - or is perceived to perform - his duties. The same cannot assuredly be said in the case of a person who may be appointed to sit on a part-time basis.

There are other considerations to be taken into account. A person who has a case deemed worthy of trial by a High Court Judge may reasonably expect it to be tried by such a judge, and not by a Deputy; and yet the use which is presently being made of Deputy High Court Judges in London in the High Court of Justice has grown to such proportions that, on any one day in the legal year, much of the trial work is being carried out by Deputies rather than by the High Court Judges themselves.

It was reported in The Times, towards the end of January, that a draft report had been produced by a committee of judges and officials set up under Lord Justice Kennedy. It was reported that a group of Senior Judges and Legal Officials were asking for a large increase in the number of High Court Judges. It was said that the draft report on the judges' workload and deployment had confirmed that there was a severe shortage of such judges, and urged that the total of 83 needed to be boosted by at least another 12 judges. It was reported that the judicial shortage, described by the Lord Chief Justice as approaching a "national scandal", meant that about 60% of cases in some parts of the High Court were being handled by Deputies and by Circuit Judges, and that one Judge had said "litigants are entitled to say they want their case dealt with by a proper full-time High Court Judge".

There is undoubtedly a problem which needs to be urgently addressed. In a report by Justice, entitled "The Judiciary in England and Wales" (1992), the position of part-time appointments to the judiciary was specifically considered. It was recommended,

inter alia, that there should be a re-structuring of judicial work to allow for the appointment of permanent part-time appointments. In the course of the Report it was said that "part-time appointments at all levels, in addition to Recorderships, should considerably widen the pool from which appointments are made... It would also reduce the dangers of staleness flowing from trying the same type of cases for too long and provide a better solution to the problem of peaks and troughs than the present system of deputies. Part-time judges might specialise in some particular area; and this too would provide an important addition to judicial expertise".

Whilst there was unanimous support for part-time appointments, there was disagreement about whether the part-time judge should be allowed to continue with part-time practice. "In this situation a purist approach to the independence of the judiciary might well assume that the part-time High Court Judge or Circuit Judge would not be free to practice continually. Within the de facto world of the English approach to independence, however, it is difficult to see a greater threat to judicial independence by allowing concurrent practice, than the system which allows Deputy High Court Judges, Recorders, and District Judges such freedom".

There is a real danger in diluting the quality of the High Court Bench; and yet the present numbers of full-time appointments may not be sufficient adequately to contain the workload. There are advantages to the taxpayer in restricting the number of full-time appointments, conferring (as they usually do) significant pension rights; and yet, if the responsibility is taken and the work well-done, there is no justification for the State getting the work done on the cheap. Taking the advantages and disadvantages together, I believe that the curiously English "part-time" judiciary has a significant and useful contribution to make to the overall administration of justice.

May I conclude with three thoughts? First, I would hope that the part-time judiciary will take its place, alongside the full-time judiciary, as an equal partner, and that it will not be regarded as an inferior and essentially transitory part of the overall judiciary.

Secondly, I would hope that Recorders, as designated judges of the Crown Court, will be accorded a status equal to their full-time counterparts, that they will be assigned work which is matched to the experience and ability of each individual Recorder, and that they will not all be assigned the less demanding work.

Thirdly, I would hope that Deputy High Court Judges will be treated fairly. If use is being made of a particular Deputy on an all-but continuous basis, rather than on an occasional and exceptional basis, so that he (or she) is carrying the full responsibility of an appointed High Court Judge, then it is difficult to resist the conclusion that, when a vacancy occurs, he (or she) should not be appointed to fill that vacancy.

GRESHAM COLLEGE

"THE ECCLESIASTICAL COURTS": WEDNESDAY, 28 APRIL 1993

SIR DAVID CALCUTT

The fourth in this series of law lectures is concerned with the Ecclesiastical Courts. The promise which I made to you, at the beginning of this series of lectures, was that each of them would be based on my own experience, and on that alone. My deliberate intention was to take each of the various topics I have selected, and to discuss with you the things about each of them which have interested me. Today's lecture will be no exception.

The Church of England is, by law, established. For each Anglican Diocese there must be a court of law - usually styled a "Consistory Court" - which is as much a court of law as any other court of this country. There is a judge of each consistory court - usually styled as a "Chancellor". He is as much the judge of his court as is the judge of any other court in this country.

All of this goes back at least to the Norman Conquest. William the Conqueror established a system of parallel jurisdiction. On the one side, there were the secular courts exercising temporal jurisdiction. These courts are today principally represented by the Magistrates' Courts, the Crown Courts, the County Courts, the High Court of Justice, the Court of Appeal and (as an appellate body) the House of Lords. On the other side there were the spiritual courts exercising ecclesiastical jurisdiction. Today these courts are principally represented by the Consistory Courts, by the Court of Arches, the Court of Ecclesiastical Causes Reserved, and (as an appellate body) the Privy Council.

Now, it is as the Chancellor of 3 of our 44 Anglican dioceses that I have had experience of the work of the consistory courts; and it is that experience which I would wish to discuss with you today. My three dioceses - Exeter, Bristol and the Diocese of Gibraltar in Europe - each have a very different history, and, as a result are, each very different in character. Many institutions in this country derive their essential character either from the Norman Conquest (and the subsequent medieval period), or from the time of Henry V111 and the Reformation, or from the last 100 years. And that distinction is precisely reflected, purely by coincidence, by each of my three dioceses.

Let me say a few words about each of them. Exeter, with its magnificent central twin-towered Cathedral, is the pre-eminent diocese of the South-West of England. Exeter is still very much a "Cathedral City". The Diocese had been founded, before the Conquest outside Exeter. There had been Bishops of Cornwall from the 9th Century and Bishops of Crediton from the 10th Century. But, from about the time of the Conquest, the sees had been transferred to Exeter; and there they have remained ever since. Until about 100 years ago, the jurisdiction of the Bishop of Exeter extended not only throughout the whole of Devonshire, but also to the whole of Cornwall - a huge and unwieldy land-mass. Bishops of immense power, and some of great distinction, reigned over this huge diocese, divided, as it was into four large Archdeaconries: Exeter, Totnes, Barnstable and

Cornwall. There is a delightful story told about a forgetful 19th Century Bishop who tried hard to administer his vast Diocese, but without total success. He arrived at Exeter St. David's railway station, and explained to the ticket inspector that he had forgotten to bring his ticket. "Don't worry, my Lord. We know you". "The trouble is", the Bishop replied, "I cannot remember where I am supposed to be going". Such were some of the perils of trying to administer so large a diocese.

In 1877 a new diocese was established at Truro, for the County of Cornwall, and Edward White Benson, later Archbishop of Canterbury, and the father of one of my predecessors at Magdalene, was appointed its first Bishop. But the Diocese of Exeter remains a "great" Diocese, and the Bishop who appointed me to be its Chancellor, Robert Mortimer, was perhaps one of the last Prince Bishops of the Church. Exeter remains to this day a City which you would think of as a "Cathedral City", in the way in which you would not think of, shall we say, Birmingham. or perhaps London. Somehow the Diocese of Exeter, focussed in its great Cathedral, continues to dominate: it is still a force to be reckoned with.

Let me turn to consider the Diocese of Bristol. This diocese has a fascinating history. Bristol was one of the greatest cities of Medieval England, but it was not the seat of a great medieval Bishop; and this, I believe, has affected much of its history and development. The Bristol Avon, rising to the East of Bristol, flowed out into the Severn at Avonmouth. The City of Bristol itself apart (which was given county status in the 14th Century), Gloucestershire and Worcestershire lay to the north, forming part of the large medieval diocese of Worcester. Somerset lay to the south, substantially forming the medieval diocese of Bath and Wells. There were important religious foundations in Bristol, but there was no Diocesan Bishop.

As with so many institutions in this country, Henry VIII had in mind a system of reformation. Broadly, his scheme was that there should be one diocese for each county - a wholly admirable concept. New dioceses were proposed for various counties; but the arrangements concerning Bristol were singularly curious. The County of Gloucester became a new diocese and the old Gloucester Abbey became its Cathedral. But what was to be the jurisdiction of the newly-created Diocese of Bristol? The County of Dorset lacked its own diocese (having been part of the huge medieval diocese of Salisbury). In the result, from 1542 onwards, until the early years of the 19th Century, the Diocese of Bristol comprised the City of Bristol, and the (detached) county of Dorset - a most curious arrangement on any view. Population changes in the 19th century led to a re-organisation of diocesan boundaries. Once again Bristol was affected.

In order to cope with increased populations in the Midlands and the North of England, Bristol and Gloucester became united in one diocese, and Dorset was re-united with the diocese of Salisbury. But even that arrangement did not see out the century. In 1897 Bristol and Gloucester were once again separated. The jurisdiction of the diocese of Bristol, this time, was a strip of land to the east of Bristol about ten miles wide and about fifty miles long - known, at first, as the GWR diocese and now, no less affectionately, as the M4 diocese. And so things have remained since the end of the 19th

century; and Bristol has attracted Bishops of distinction and sanctity.

But Bristol has never been, as Exeter always has been, a "Cathedral City" in quite the same sense. If you think of Bristol, you think of it as a great commercial centre - as it was once, second only to London - and perhaps as a city in which there is also a cathedral; in fact two cathedrals. It is somehow symbolic that the building which was adopted for the seat of the Bishop acquired its present nave only in the 19th Century.

Let me turn now to my third diocese - the Diocese of Gibraltar in Europe, or, in law, the Diocese in Europe. It is now a Diocese within the Province of Canterbury. It is the 44th and latest addition to the family of dioceses within the Church of England. The latest diocese cares for the Anglican communities which are in continental Europe, from Turkey to Tenerife, from Brussels to Biarritz. Its history is complex.

Anglican communities living in Northern Europe had been under the care of the Bishop of Fulham (he being a Bishop Suffragan in the Diocese of London). Anglican communities living in Southern Europe had been under the care of the Diocese of Gibraltar, which had been founded in 1842. The newly-created Diocese in Europe brought the two together. The Bishop has cathedra not only in Gibraltar, but also in Malta and in Brussels. There are no less than eight Archdeaconries, some with irresistible titles. Whatever may have been said of the Bishop who would sign his letters "Archibald of the Antarctic", how tempting it must be to become "the Venerable the Archdeacon of the Riviera". When my wife once explained, with her tongue in her cheek, that I was indeed the "Chancellor of Europe", and although there was, I suppose, an element of truth in it, the hearer's credulity was stretched to its limits. Whatever may be said of Exeter and Bristol, it can never be said that "Europe" immediately conjures up in the mind the image of one of the great dioceses of the Church of England. "Europe" may mean different things to different people, but it is unlikely to mean that.

So much, then, for the background against which I have acquired my experience in three dioceses. Let me turn now, to the work which is undertaken by these courts, before going on to say something about the way in which it is handled. The divide I have already described between the work of the secular courts and that of the ecclesiastical courts was differently made until about the middle of the 19th century, from the way it is now. The ancient jurisdiction of the ecclesiastical courts was wide. Not only did it cover what might be described as purely "church matters", but it also included questions which involved a pronounced moral element. Marriage and divorce, wills, probate and administration of estates, libel and defamation, as well as the purely "church" matters fell within its jurisdiction. It was only in the 19th century (for the most part) that much of that jurisdiction had necessarily to be transferred to the secular courts, leaving the ecclesiastical courts with the more limited "church" jurisdiction which they now exercise.

As in the secular courts, where there is a division between criminal and civil work, so in the ecclesiastical courts there is a similar criminal/civil division, represented principally by

disciplinary cases (on the criminal side), and principally by faculty cases (on the civil side). The disciplinary (criminal) jurisdiction is very much alive, and there have been several examples in recent years of its having been used. But the cost of instituting and prosecuting disciplinary proceedings is prohibitively high; and this has always to be borne in mind before any such proceedings are instituted. I am thankful that, in my twenty-two years as a Chancellor, I have not yet been called upon to preside over any disciplinary proceedings.

The bulk of the present work of the consistory courts is on the civil side, and relates principally to the exercise of the Faculty Jurisdiction. In essence, a Faculty is no more than a license - a permission if you like - to do something which, if that permission were not granted, would be unlawful. Let me give some examples, which will make my meaning plainer. Any significant change to the fabric of a church or any change in the churchyard requires lawful authorisation in some form or other. Similarly the sale or the disposal of church property requires lawful authorisation. And the normal way of dealing with each of these matters is through the Faculty Jurisdiction: a petition for the faculty, followed by consideration of that petition, and, in the absence of opposition (or after having considered that opposition) the grant or refusal of the Faculty sought.

There are, perhaps, four prominent aspects of the exercise of the faculty jurisdiction which are worth drawing to your attention. First, there is the maintenance of the church buildings themselves. The good maintenance of the fabric of church buildings, up and down the country, is a matter not simply of concern to the church and its members, but also of a national-environmental and historic-concern. But, to a large extent, the State has so far been content to leave the proper maintenance of churches in the hands of the church, rather than to insist that it should be in secular hands.

In this way the Planning Laws of this country do not apply to churches with the same rigour as they do to other significant national buildings. This is the so-called "Ecclesiastical Exemption". Where listed building consent might otherwise have been required, the State is content to allow the jurisdiction to be exercised by the Consistory Courts through the Faculty Jurisdiction. The arrangements have worked reasonably well in practice, but the balance is always a delicate one. The jurisdiction cannot but be exercised at some cost to the church and its members; and this inevitably gives rise to a temptation to flout the jurisdiction. But it may be as well to reflect that, if ever the jurisdiction were to be flouted on a wide-spread scale, then undoubtedly the Exemption would be withdrawn, and changes to the fabric of churches would be subjected to the full rigour of the planning laws.

The second significant area where the faculty jurisdiction comes into operation is where a church wishes to re-order its internal arrangements. Liturgical practices have, as is well known, varied from generation to generation. The needs of the medieval church were different from the needs, for example, of the 18th Century. And again the Tractarian Movement called for a change of internal arrangements. In our own day several pressures come together to call for further internal re-arrangement. The emphasis on a Parish Communion, as the

central act of worship on Sundays and Holy days, the increased sense of corporate worship, and the need to make a greater use of the church building itself, often combine together to call for re-arrangements which involve a central altar and ancillary community facilities within the church building.

Inevitably, proposed schemes of re-arrangement are liable to lead to internal conflicts within the parish. There are those who are reluctant to see changes in the layout of the church which they have come to know and love. But, as against that, there are those who feel, with some justification, that the building itself must be adapted, from time to time, to meet the needs of each generation. Each case must, of course, be considered on its own facts, and the wishes of the worshipping congregation are important. But my own broad view is that where changes can be made without fundamental structural alteration, they should generally be permitted. But if the proposed changes, are, for all practical purposes, irreversible, then I think it needs a much stronger case to justify them.

Thirdly, and to some extent interlinked with the first two matters, is the difficult matter of authorisation of the sale of inherited treasures. This requires the authorisation, by way of a grant of a faculty, if lawful title is to be passed. There are those who hold that the church has no business to retain inherited items of great value - cups, flagons, patens, all made of silver, and dating perhaps from the late 16th or early 17th centuries - and which, because of their potential value, often have now to be stored permanently in bank vaults.

At the other end of the argument, there are those who hold that the church has no business to part with treasures which have been given to the church by earlier generations and which form an important part of its inheritance. There is, in my view, no perfect answer to this dilemma. In the decision in the Court of Arches - which is the Court of Appeal for Consistory Courts in the Province of Canterbury - in a case which came from Tredington (in the Diocese of Coventry) (1971) 2 WLR 796, it was held that some good and sufficient ground - some special reason - must be proved before a faculty can properly be granted. That test strikes me as sensible; but, of course, the difficulty is to apply that test to the facts of each individual case. The arguments either way are many, powerful and, in my view, about equal.

Three such cases have caused me particular difficulty, and I mention them to you briefly. A town in the West Country needed to raise significant funds for the repair of its church. The church was in possession of valuable ancient silver which was not currently in use, and which had to be stored in a place of safety. A petition was presented to authorise the sale. There was opposition to the grant of a faculty. On the evidence I could not be satisfied that all reasonable efforts had been made to raise the necessary funds by other means. In my view it would have been wrong to have granted the faculty, and I refused to do so. An incidental benefit of such a refusal is that it is then open to the parish to say, in its attempt to raise funds, that it has tried to sell its silver, but that it has been told it cannot do so.

A second case which I had to consider came from a tiny Devonshire parish which again needed to raise funds for the repair of its fabric, but which was in possession of a moderately valuable painting. Two things were quite plain. First, there was no possibility of the church ever raising the funds which would have been required for the repair of the fabric. Secondly, the painting was deteriorating by reason of its being housed in the damp church. In this case it seemed to me right to grant a faculty, and I did so.

Thirdly, I have had to consider, more recently, another case of redundant silver. A church which once stood in the very centre of the ancient City of Bristol was the beneficiary, in the early 17th century, of several pieces of valuable silver. But, in the 19th century, the ancient church was pulled down and partially re-built a mile or so to the north of the ancient centre of the City. The re-sited church and parish subsequently became combined with other parishes and the re-sited church itself, in due course, became redundant. The parish church which was retained in active use by the Christian community, inherited by this curious route, silver which had been given to a different church (and a differently sited church). The needs of the new parish were acute. It was an area of great social deprivation, and there was a special need for raising funds to enable the Christian community to fulfil its role in that part of Bristol. It seemed to me that it was right that the silver should be sold, but not, in the first instance, on the open market. I have recently directed that there should be an opportunity for a sale which would enable the silver to remain in the City of Bristol, but that if that should not prove possible then, in due course, there may have to be a sale on the open market.

I pass to the fourth category of matters which now principally concern the Faculty Jurisdiction; this relates to the care and maintenance of Churchyards. Again this is a highly sensitive area, and one in which the nation as a whole has a legitimate interest. The conflict may be simply expressed in this way. A person, recently and grievously bereaved, may well feel, with some justification, that he or she has a right to erect whatever kind of memorial he or she would wish, to commemorate the place of burial of the deceased person; and people in such a state are often not in best frame of minds to weigh finely balanced arguments which may tell the other way, and to make sensible judgements about them.

As against this, the parish churches of this country are commonly enhanced in their setting by the ancient churchyards which surround them: it is important that such memorials as are put up are appropriate to their setting. Increasingly, the public as a whole is sensitive to environmental considerations, and there is a balance which has somehow to be struck. Most dioceses have now produced Regulations relating to Memorials in Churchyards; and they are to be of general application throughout each diocese. Such regulations attempt to set the limits within which the local Incumbent may exercise his own discretion (delegated to him by the Chancellor) to grant permission for the erection of suitable memorials.

This always leaves open the possibility of a petition to the Consistory Court to permit a particular memorial which falls outside the norm for the diocese.

It has always to be borne in mind that tastes change from generation to generation; and it would have been dull indeed if some of the inscriptions from the 18th and 19th centuries had been refused because they did not conform to some norm. There have been occasions when I have permitted memorials which have fallen outside the norm. A churchyard which is an extension of the churchyard surrounding the parish church, and well away from it, may justify special treatment. In other cases there have been pastoral reasons which have compelled me to take the view that to insist on the norm being maintained would be unreasonable.

At the end of the day, the exercise of the Faculty Jurisdiction is largely a matter of judicial discretion. That is to say, it is a discretion which must be exercised on the evidence, not in a capricious manner, and one which must be exercised responsibly; but it is usually a matter of discretion, rather than one of law.

I would now wish to turn, if I may, from the jurisdiction of the ecclesiastical courts to the courts themselves and to look at the way in which they operate; and, it might be helpful to see how they have operated in recent years until the changes which were made in March 1993. The Judge of the Consistory Court is usually styled the "Chancellor". He is, traditionally, qualified as a barrister. He will often be a Queen's Counsel, but he may be a full-time judge, either a Circuit Judge, or exceptionally, a Judge of the High Court. It is an appointment which occupies only a part of the professional time of the holder of the office, whoever he is.

In the eyes of the law, the Chancellor holds a high position within the diocesan hierarchy: he stands second only to the Diocesan Bishop; and indeed, in exercising several legal functions, he is the alter ego of the Bishop himself; and the Bishop must, by law, have a Chancellor. But I would not wish you to have the wrong impression. There are many others who, in practice, occupy a far more significant position in the work of the Diocese than does the Chancellor - the Suffragan Bishops, the Archdeacons, the Registrar, the Diocesan Secretary, to name but a few. But, in the final analysis, the powers and responsibilities of the Chancellor are significant.

The Chancellor is supported in his work by the Diocesan Registrar (who is a practising solicitor) and his staff. Much of the administrative work of the Court is carried out by the Registrar, and he plays a vital role in the proper ordering of the affairs of the Court. However much some people might wish it were not so, it is the fact that the affairs of the church are regulated by law, and often in a way which is far from simple. There is an essential need for the professional services of a specialised qualified lawyer.

Whenever economies have to be made, it can only lead to difficulties if they are made at the expense of adequate and competent legal services. The Archdeacons fulfil many roles within the diocese; but they have an important part to play in the maintenance of law and order. They are the enforcement officers of the law, and it is always open to them to institute or to defend proceedings in the Consistory Court, on an ex-officio basis. They have also for many years had delegated to them some of the non-contentious and less significant faculty work. Similarly, with regard to memorials in churchyards, as I have already indicated,

Chancellors have delegated to Incumbents the power to authorise the erection of memorials, provided they fall within certain specified limits.

A further important part of the framework is the Diocesan Advisory Committee. Let me explain. For each diocese there has, for many years now, been a Committee which is charged with the duty of advising intending applicants for faculties and the Chancellor on matters falling within the faculty jurisdiction. The Committee has been made up of the Archdeacons and of others, often with expertise in a particular field. Their work has been of vital importance to the proper administration of the faculty jurisdiction. They consider most of the applications which are made for a faculty, and give their advice. Sometimes this results in amendments being made to the petition before the petition has formally to be considered by the Consistory Court. A Petition which has the support of the Diocesan Advisory Committee, and to which no individual objections are raised, usually results in the grant of a Faculty. But it does sometimes happen that the DAC feel that they cannot recommend the grant of a faculty, and the parish is unwilling to follow the DAC's advice. In those circumstances the petition has to be considered by the Court, without favourable advice, and a decision reached one way or the other.

The Court nowadays rarely sits in open court to hear and decide a petition; but there are circumstances where this is still necessary. First, there are some cases where the issues involved are so significant that, even though there may be no opposition, it is right that there should be a hearing in open court. An example of such a case might be a petition to sell inherited silver of considerable significance and value.

In contested cases - where opposition has been raised to the grant of a faculty - then it may also be necessary to hear a case in open court: this is a "right" which is always available to any petitioner, and indeed to any lawful objector who is unwilling for the contested petition to be dealt with by other means.

But, fortunately, within the last few years, it has now become possible, provided there is the consent of all the parties, for a petition which is contested to be considered and determined simply on written representations. In my view, there is a great deal to be said for this procedure. It is rare that the parties feel that justice can only be done if there is a hearing in open court: most are content to put their arguments into writing, and to leave it to the Chancellor to determine the matter simply on those written representations. This new procedure also has the great benefit that it helps to contain the costs which are inevitably and regrettably involved in any court proceedings.

What, then, of the future? Significant changes have recently been made in the operation of the Faculty Jurisdiction. The level of involvement and the standing of the Diocesan Advisory Committee has been significantly raised. So far as the operation of the Consistory Courts are concerned, it has always seemed to me important that decisions should be taken at an appropriate level and in an appropriate manner. So I welcome the new arrangements under which most decisions relating to faculties will be taken, in future,

not by the Chancellor, but, by delegation, by the Archdeacon; leaving the more serious and contested cases to be dealt with by the Chancellor.

At the same time it seems to me to be helpful that the powers of the Consistory Court should have been expressly enlarged to enable the Court, in appropriate cases, to grant Injunctions and to make Restitution Orders. In many respects, the changes reflect no more than a continuing development along the lines that things have, for some time now, been going. Of fundamental importance is the fact that the church is to continue to exercise substantial control over its own affairs and inheritance.

I am sure that it is better for the Church to continue to exercise its ancient jurisdiction over the various "church" matters which I have outlined, if it can; but there must always be a risk of lawlessness within the Church itself; and if this were to happen, then the State might not unreasonably take the view that the Church could not reliably be left to oversee effective control over matters which are, in part, of national concern.

GRESHAM COLLEGE

"APPELLATE JURISDICTION IN THE CHANNEL ISLANDS" : 26 MAY, 1993

SIR DAVID CALCUTT

A few years ago a leaflet was found in the Gare Maritime at St.Malo. It extolled the virtues of Jersey. "Come to Jersey - the Enchanted Isle" - it proclaimed. "Jersey is not a member of the Common Market". Whether this is wholly true, and whether it would be a virtue, is not to my principal purpose in adressing you today. But "Enchanted Isle" it undoubtedly is, along with Guernsey and the other Channel Islands.

Not without good reason do the Islands, and stories about them, make good copy in the newspapers. In December 1986 The Financial Times carried a Survey, running to 12 pages. "In contrast with Britain, where many areas are wrestling with high unemployment and painful economic change, the Bailiwicks of Jersey and Guernsey are pondering how to cope with their economic success as Europe's leading off-shore financial centre". Precisely one year later, the FT carried another lengthy Survey. "The Channel Islands: money is pouring in as this off-shore haven develops into an International Finance Centre".

Just over a year ago, the UK newspapers were full of a story which brought the judiciary in Jersey into prominence. It was said that the Deputy Bailiff had got behind with his work, and that he had taken too long to deliver his judgements. I have no wish to enter into the rights and wrongs of the matter; but it raised constitutional issues of significance between the Island and the UK; and it made good copy for the newspapers.

As a final and recent example of the attraction of the Islands to the reading public in the UK, The Daily Telegraph published an article with the startling headline: "Feudal Cry for Help Silences a Mechanical Digger on Sark". With a passage in gothic script entitled "Clameu de Haro. Je fais Haro sur vous. Haro, Haro, a l'aide mon Prince. On me fait tort". Undoubtedly, compulsive reading. I shall return to it.

It was to these Enchanteed Islands that I was invited to come, by the then Home Secretary, as a Judge of the Courts of Appeal of Jersey and of Guernsey. For 15 years I have sat as Judge of the Courts of Appeal there; and it is my experience, as one of those Judges, that I would wish to share with you today. But please do not expect from me a full and complete exposition either of the law or the practice of the courts of those Islands. As in earlier lectures, my purpose simply is to draw to your attention those matters which have particularly interested me during the course of my work. Inevitably they are a random selection.

But I should, I think, begin with a little history. The Law Officers of the Crown in Jersey made a Report, comparatively recently, on various constitutional matters affecting the Island of Jersey. Their Report did not relate specifically to the position of the Island of Guernsey, but for my purposes which are of general nature, the distinction may not be of great significance. The Law Officers' introduction to the Constitutional History of Jersey

recorded that in 933 Jersey, together with the other Channel Islands, was annexed by the then Duke of Normandy - William Longsword - and that it thereafter formed part of the Duchy of Normandy. In 1066, the then Duke of Normandy, William the Conqueror, after defeating Harold, King of the English, at the Battle of Hastings, became King of England. Between then and 1204, except for a brief period, England and the Duchy of Normandy were united in the person of the occupant of the English throne, who was both the English Sovereign and the Duke of Normandy. In 1204 King Philip Augustus of France drove the Anglo-Norman forces out of Continental Normandy, but his attempts to also occupy Insular Normandy were not successful, except for brief periods when some of them were taken by French forces.

Thus, the Channel Islands remained, as before, united with England; and this fact was placed on a legal basis by subsequent treaties concluded between the Kings of England and France. The Channel Islands are dependencies of the Crown - i.e. they are outside the United Kingdom. They are distinguished from the Colonial and other overseas dependencies not only by their proximity to Great Britain, but also by their History and their special relationship with the Crown of England.

Recognition of these distinctive features possibly accounts for the decision taken in 1801 to separate Government business connected with these Islands from Government business connected with the Colonies. In that year, business connected with the Colonies was transferred from the Secretary of State for the Home Department to another Secretary of State; but no change was made as regard business connected with these Islands, and today such business remains with the Home Secretary.

The distinction between the ancient dependencies of the Channel Islands and the Isle of Man and the Colonial dependencies was exemplified in recent years by a special provision in the British Nationality Act, 1948. A Channel Islander (or a Manxman) is authorised by the Act to call himself "a citizen of the United Kingdom, Islands and Colonies".

I ought to say a word to you about the relationship between the Channel Islands and the Common Market. In the years leading up to the United Kingdom's accession to the Treaty of Rome there were continuing negotiations relating to the position of the Channel Islands. The arrangements finally worked out with the Community provided that the Treaty of Accession should apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the treaty concerning the accession of new Member States to the European Community. These arrangements are to be found in a Protocol to the Accession Treaty. That effectively provides that the Community Rules on customs matters and quantitative restrictions shall apply to the Channel Islands under the same conditions as they apply to the United Kingdom.

Jersey is treated, so far as industrial, agricultural and horticultural products are concerned, as being a member of the Community, so that these items may freely be imported into or exported from Jersey to other Member States without customs duties being imposed. But, by contrast, Jersey is required vis-a-vis

third countries to impose custom duties on imports at the levels laid down by the Commission in Brussels. In return, the Accession Treaty provides that the Community Rules necessary to allow free movement and observance of normal conditions of competition in trade in those products shall also be explicable.

Mr. Paul Egerton-Vernon, a partner in a firm of Solicitors practising in Jersey, writing in the Law Society's Gazette in October 1986, expressed the conclusion that those who oversaw the negotiations with Brussels in 1970/71 produced a most favourable position for Jersey in the context of the Common Market as a whole. He pointed out that the leaflet in the Gare Maritime, stating that Jersey was not a member of the Common Market, was at once true and false; and that Jersey, together with the other Channel Islands and the Isle of Man enjoyed a very special and beneficial status within the Common Market.

The history and constitutional position of the Islands, which I have briefly outlined, underlines one over-riding characteristic, if it underlines no other. The Islands are collectivly determined to maintain their independence, whether it be an independence from the United Kingdom (or, for that matter, France), and an independence from one another. I shall be speaking, in a few minutes, of the circumstances in which the Courts of Appeal came to be set up; but, may I draw to your attention, in this context, the form of oath taken by a Judge of the Court of Appeal on his appointment. Having sworn and promised to execute faithfully the office of Judge, having promised to maintain the advancement of the Glory of God and the Honour of Her Majesty the Queen, the Judge then promises to guard and maintain all the laws, liberties, usages and ancient customs of each of the Bailiwicks. I have never doubted that this requires each of the Judges to protect each of the Islands from any improper claims made either by the United Kingdom or by another of the Islands.

Let me move from the central consideration of independence, to say something about the law of the Islands - and of each of the Islands - as I have perceived it. When I was first appointed, I enquired where one looked to learn what the law of the Channel Islands was. I received a short and sharp rebuke. "You should understand that there is no such thing as "the law of the Channel Islands. There is a law of Jersey, a law of Guernsey, and law of Alderney, and a law of Sark; and each may be different from the other". Humbled, but persisting, I asked "where can I read the law of Jersey, and so on?" Again I was felled to the ground. "You can't. We rely on the advocates". This is not, I hasten to add, the whole truth; but there is an element of truth in it.

Three particular aspects of the Laws of the Islands have interested me; and I believe they are worth mentioning to you. First, there has been a continuing shift, in recent years, from a Norman-French basis of law to an English basis; and I believe that this is part of a change which is not restricted to matters relating simply to the law. Road names are often to be found expressed both in English and in French. Often an earlier French name has now been replaced or added to by an English name. English seems now to be spoken more commonly as the usual language of conversation; but, in the north-east part of the Island of Guernsey I recently found people working in the fields who spoke only French - a Norman-French

patois. They apparently spoke no English at all.

Going to matters of law, I have the impression that English is replacing French as the language in which the laws and proceedings of the courts tend to be expressed. Formalities tend still to be expressed in French; but the substance in English. Perhaps I can illustrate this most appropriately on this occasion, by reading the title page of the very law which set up the Jersey Court of Appeal. The text of the Act itself is in English, save for the oath to be taken by Judges of the Court of Appeal, which is in French. Again, staying with formalities, the proceedings of the courts in Jersey are opened and closed in French, but the Court is addressed in English.

Of far greater significance, I believe, than matters of mere formality, is a shift which I believe to have occurred in the significance of the doctrine of Precedent. The English common law doctrine of precedent is an unfamiliar concept in a civil law system. The importance of the decision in the instant case would be less for future cases in a civil law jurisdiction than it would in a common law jurisdiction. It is therefore not without its significance that in Jersey, and to a lesser extent in Guernsey, the decisions of the courts tend now to be reported and made available publicly for the guidance of courts which may have to consider similar situations in the future.

In Jersey there has now been established since 1950, a regular series of Law Reports, comparable to the Reports in any common law jurisdiction. In Guernsey there has been set up a more informal Law Journal, but it fulfills essentially the same function as the reports.

Another aspect of the administration of the law in Jersey (but not in Guernsey) which I believe to be worthy of your attention, is the involvement of the prosecution (in criminal cases) in the matter of sentence. It is commonly said, in England, that the prosecution, in a criminal case, is in no way involved in sentence, and that that is a matter which is left to the court, together with such submissions as may be made on behalf of a defendant. By contrast, in Jersey, the Crown presents its Conclusions - i.e. it recommends the sentence which it believes to be appropriate in any particular case. As a matter of pure law, no doubt, it is correct that the prosecution, in England, is not strictly concerned with sentence, but in practice, it is.

Without suggesting any particular sentence, it is the fact that the prosecution lay particular charges, accept particular pleas, and will draw to the attention of the court those facts which it believes to be relevant to sentence; and selection inevitably involves emphasis. There is, in my view, a good deal to be said in favour of the system employed in Jersey. The Court is under no obligation to accept the "Conclusions", and may (and sometimes does) impose a sentence which is more severe than that recommended by the prosecution; but I believe that it may be helpful for the Court at least to have the benefit of a steer from the prosecution.

The third matter which I mention, and to which I have already referred at the beginning of this lecture is the "Clameur de Haro" not simply because it is picturesque, but because I believe it has

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en date du 27 septembre 1960

INTITULÉ

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CONFIRMÉ PAR

Ordre de Sa Majesté en Conseil

en date du 26 mai 1961.

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a practical and highly useful purpose in the Islands. It is worth reading to you briefly a part of the report by Mr. Ben Fenten which appeared in The Daily Telegraph on 14 April 1993. "Silence fell when Mr. Paul Armorgie dropped to one knee in front of a mechanical digger on the Island of Sark, threw his hat to the ground, held his hands above his head and raised the Clameur de Haro. The digger driver immediately switched off his engine and climbed down. If he had unwisely chosen to press on, he would have been liable to spend a day in the lowest dungeon of the castle. Mr. Armorgie, the owner of one of the six hotels on the tiny Channel Island invoked the feudal right as what he called "the last resort" in a planning dispute with his neighbour. His aim is to prevent his neighbour from building a house on ground next to the swimming pool and dining room of the hotel. Mr. Armorgie said that in his case normal disputes procedures had failed. All work on the site must now stop for a year and a day, unless the neighbour challenges the Clameur in front of the Seneschal, the chief civil authority on Sark and the Queen's representative".

I have no wish today to go into the rights and wrongs of this particular use of the Clameur, but merely to draw attention to its existence, and to its practical use. The Clameur, whose existence has recently been up-held in law, has a practical advantage. The raising of a Clameur has an effect in Island law similar to that of an interim injunction obtained in the courts of this country; but the Clameur is even quicker, and so arguably even more effective. Of course the Clameur procedure is open to abuse, as is the process of an injunction; but penalties for abuse are similarly available and equally effective.

Let me turn then from the law itself to the administration of the law, and, in particular, to the setting up of the Courts of Appeal in the Channel Islands. In St. Helier in Jersey and in St. Peter Port in Guernsey, there are Royal Courts which hear and determine the significant civil and criminal litigation. At the head of the judiciary there is a Bailiff. He sits alone or with Jurats; and although they fulfill some of the functions carried out by jurymen in England, it would be wrong to equate the two.

Appeals from tha Royal Court used to go directly to the Privy Council. This appellate body, sitting in London, and composed largely of Law Lords, was once much busier than it is today, hearing appeals from British territories all over the world. It is still busy enough, but constitutional changes throughout the world have reduced the possibility of appeals from many territories. So far as the Channel Islands were concerned, it was plainly appropriate that there should be some intermediate tier, standing between the Royal Court and the Privy Council. Although (historically) an appeal is a privilege rather than a right, and conferred only by statute, the quality of justice is more likely to be improved if the court in question knows that there is some right of review of its decision.

There had long been proposals for a regular system of appellate jurisdiction in the Channel Islands. The legislative process in Jersey is commonly by an "Act of the States" (the legislative body of the Island) or, in Guernsey, by a "Projet de Loi", followed by an Order in Council, followed by registration of the Order in the Island. In 1949 legislation had been enacted which provided for a Court of Appeal of the Channel Islands; but the legislation

appears never to have been implemented in practice. I cannot help feeling that one of the reasons may well have been the concept of one Court of Appeal for the two jurisdictions of Jersey and Guernsey.

My view is, perhaps, reinforced by the subsequent enactment of legislation, in 1960/61, which provided for a Court of Appeal for each of the two Bailiwicks: and that is the legislation under which the two courts now sit. Even so, it was not until 1964 that judges were appointed and the courts began their work. The judges who have been appointed have, in the main, been practising Queen's Counsel, coming either from England or from Scotland. The first tranche of judges included the Jerseyman, Godfray le Quesne (now Sir Godfray). He is now the senior Juge Ordinaire; and he, more than any other person, has brought a distinction upon the work of those courts, which it might otherwise have lacked. The inclusion of a Scottish advocate has been of great advantage to the Islands. The Norman-French origin of the jurisdiction has, from time to time, been reflected in the law of Scotland; so that a Scottish lawyer can bring an experience to bear on the work of the court which might otherwise have been lost.

The Courts of Appeal are not in regular session. When I first joined the court, a Court of Appeal was convened as and when necessary. Inevitably the work of the court increased; and it has now become necessary for the Court to sit in each Island quarterly, usually for the inside of one working week; but this has had to be supplemented, from time to time, by emergency sittings between the quarterly sessions. Although some of the interlocutory work can be carried out by a single judge, sitting within or outside the Island, hearings require at least three judges to hear and determine appeals.

The work of the courts differs only in quantity from the work of the Court of Appeal in England. There are the criminal appeals from decisions of the Royal Court, sitting with Jurats, both with regard to conviction and, with leave, as to sentence. Then there are the civil appeals which cover the same range of human and corporate activities as appeals which reach the English Court of Appeal.

The law, as I have indicated, is the law of Jersey, alternatively the law of Guernsey and so forth, but, increasingly, the decisions of the English Courts (and particularly the House of Lords) are cited, and have strong persuasive authority.

But there is, perhaps, one particular respect in which there is a difference between the practice of the Islands and England which is worth drawing to your attention. Each domestic jurisdiction is entitled to determine how it wishes to tackle certain forms of criminal activity. The misuse of drugs is a case in point. The view is taken in the Island of Jersey that the Island is particularly vulnerable to abuse in this respect, and that its resources to tackle the abuse may be more limited than in England. Jersey has taken the view that it should take a different view from the courts in England with regard to the way in which it tackles drug misuse; and, as a result, significantly higher penalties have been imposed in Jersey for similar offences. In my view this is a wholly defensible position.

I have spoken of the Islands's independence. May I end by emphasising, if emphasis be needed, on the independence of the two Courts of Appeal. When I first arrived in the Islands, a friend arranged a small dinner party the night before I was sworn in, to welcome me. The friend had invited several of the Jurats. At the end of the meal, and after the women had withdrawn, the senior Jurat drew me aside.

> "Young man, we are delighted to welcome you to the Island, but we want you to understand quite plainly that we do not expect our decisions to be reversed".

The next morning, I did just that.

GRESHAM COLLEGE

"THE TAKEOVER PANEL": WEDNESDAY, 23 JUNE 1993

SIR DAVID CALCUTT

It is fitting that I should devote one of this year's six Public Lectures in Law to the Takeover Panel. The Takeover Panel began work in March 1968, and this co-incided with the publication of the first edition of the City Code on Takeovers and Mergers. Thus the Panel and the Code celebrate their 25th Anniversary this year.

There had been a general guide for those concerned in takeover and merger transactions since 1959, but no permanent body had been established to monitor observance of the guide. The decision to formalise and strengthen the guide's principles, in a code of conduct, followed the intense takeover activity of the mid-1960s, and increasing concern about some of the practices which were then adopted. The Panel was, then, created to interpret and administer the new code.

So let me say a word, first, about the Code. The Code has four fundamental objectives. First, it seeks to ensure the fair and equal treatment of all shareholders in target companies. Secondly, it seeks to ensure that all shareholders in target companies have adequate information to enable them to make up their mind on the merits of an offer, and to have that information in sufficient time to enable them properly to make that decision. Thirdly, it seeks to provide a fair market in the shares of companies which are involved in takeovers. Finally, it seeks to avoid frustrating action being taken by the management of target companies, unless that action has the approval of the shareholders of the target company.

Since the first edition of the Code was published in March 1968, it has been expanded considerably; but its four fundamental objectives have remained the same.

It may help you, I believe, if I now emphasise to you what the Takeover Panel is not, because, however hard one tries, the confusion seems to continue. The Panel is not concerned with the commercial merits of a takeover bid. Merits -or lack of merits - are for the shareholders in the target companies themselves to determine. The responsibility for assessing merits is the responsibility of the shareholders themselves - not of the Panel. It is, as I have just explained, one of the fundamental objectives of the Panel to ensure that shareholders are provided with adequate and timely information; but that is to enable the shareholders - not the Panel - to judge the commercial merits of any bid.

Nor are "public interest considerations" the concern of the Takeover Panel. Whether a change of control is or is not in the public interest is the concern, in the United Kingdom, of Governmental authorities: the DTI, the Monopolies and Mergers Commission, and the Office of Fair Trading; or, in some cases, the European Economic Community, through the European Communities Commission.

So you will understand when I say that I was none too sure how to respond when I was introduced, on one occasion, first as the "Chairman of the Office of Fair Trading", and, when I did my best to explain that that was not quite right, it was corrected to the "Chairman of the Monopolies and Mergers Commission".

Let me say a word, next, about the Takeover Panel itself and its members. There are just under 20 members of the Panel. They are all part-time. The Panel draws its membership from members who are independent of any specific interest and from representatives of the major financial and business institutions. There is a Chairman, and two Deputy Chairmen, each of whom is appointed by the Governor of the Bank of England. Representative membership is designed in such a way as to ensure a spread of expertise in takeovers, the securities market, industry and commerce. It is important that all those who have an interest in the work of the Panel should be adequately represented on it; and it is particularly important that the voice of industry should be heard. Accordingly, industry is represented not only by the presence of the CBI, but also by two nominees of the Governor of the Bank.

Then there are representatives from the other relevant professional bodies:

-The Association of British Insurers,
-The Association of Investment Trust Companies,
-The Association of Unit Trusts and Investment Trusts,
-The British Bankers' Association,
-The British Merchant Banking and Securities Houses Association,
- and its Corporate Finance Committee,
-The Institute of Chartered Accountants,
-The Investment Management Regulatory Organisation (one of the SRO's,
-The London Stock Exchange,
-The National Association of Pension Funds, and
-The Securities and Futures Authority.

The principal function of the Panel is to administer the Code, and to make sure that the Code keeps abreast of developments which may occur in the field of Takeovers.

The day-to-day work of the Panel is carried out by a full-time Panel Executive. The Executive is presided over by a Director General - presently Frances Heaton on a two-year secondment from Lazards. She is supported by three deputies Director-General (all of whom are employed by the Panel on a permanent basis), by several "Secretaries" (some of whom are permanent, others on secondment from various professional bodies), and by "Assistant Secretaries" (who are also on secondment).

It is the Panel Executive which bears the heat and burden of the day. It is the Executive which gives quick and authoritative responses to queries, and which makes, when necessary, ruilings on the interpretation and application of the Code. From the beginning to the end of any bid, it is the Executive which monitors that bid at all stages to make sure that the bid is conducted in accordance with the provisions of the Code. Perhaps the most remarkable feature of the Executive is the smallness of its membership. I have explained to you that the Panel itself has just under 20 members. The Executive is even smaller: it has no more than about 15 members at any one time.

What other country could carry out so central and important a function with so few people? Smallness of numbers is an attribute which I draw to your particular attention. I believe it to be a valuable attribute which could easily be lost. I shall return to that aspect of the matter in a few minutes' time.

I have mentioned that one of the functions of the Panel Executive is to give rulings on the true interpretation of the Code. It is sensible, at this point, to mention the second important function of the Panel itself. It is to hear "appeals" from rulings made by the Executive. If a ruling is made by the Executive which one of the parties does not accept, then the aggrieved party may "appeal" to the Panel itself; and that "appeal" will be heard usually within 48 hours, and a ruling given before the markets open the following day. It is an important characteristic of the Panel system, and indeed a requirement of the Code, that wherever there may be any doubt, the parties to a bid should seek advice and authoritative rulings from the Executive.

Our aim, if you like, is to try to prevent things from going wrong, rather than to have a mess to clear up after the event. But, inevitably, things do go wrong, and from time to time (though far more seldom than you might imagine) there are breaches of the Code. In these circumstances the Panel Executive may have to initiate disciplinary proceedings in respect of the breach. It is, then, a function of the Executive to present disciplinary proceedings for adjudication by the Panel itself. These are, then, the principal functions of the Panel itself on the one hand, and its Executive on the other. For the sake of completeness, may I add that there is, very much as a long-stop, an Appeal Committee, which is usually headed up by a retired Lord Justice of Appeal.

Briefly stated, if the Panel gives leave, or in certain other specified circumstances, there may be an appeal from the Panel itself to the Appeal Committee of the Panel.

Characteristics

The essential characteristics of the Panel System are fourfold:
-the facility for advance consultation;
-flexibility;
-certainty;
-and speed.

Let me say a word about each of these characteristics in turn.

"Advance Consultation". As I have just mentioned, one important characteristic of the Panel System is that the parties to a bid are required to consult the Panel "in advance". But this is not merely a requirement of the Code. It is a facility which is of immense value to the smooth running of the takeover process; but it is also one which would be difficult to contemplate under any statutory system.

"Flexibility". The City Code does not seek to have the force of law: it is a Code of good practice. Accordingly. it is the duty of the Panel to focus principally on the fundamental objectives of the Code, and to ensure, as best it can, that the Code, in its application, remains sufficiently flexible to meet every new twist and turn which may arise in the on-going development of the bid

process. Detailed rules have been devised over the years, reflecting experience gained from the regulation of many individual bids; but, at the end of the day, it is the underlying fundamental objectives which prevail, and not the detailed rules.

"Certainty". It is particularly important for industry and for practitioners in the financial markets to know precisely where they stand in any bid which is being regulated under the Code. A ruling by the Executive on the interpretation of the Code is usually given within a matter of hours; and, as I have already explained, any appeal will usually be heard and decided within a day-or-two. Once a ruling has been given, there is then, for all practical purposes, "certainty".

Involvement of the Courts. This is, perhaps, the point at which to mention such involvement as there is in the Panel's affairs of the Courts of Law. The role of the Takeover Panel has been considered by the courts in a number of cases brought, by way of judicial review, starting with the decision of the Court of Appeal in Datafin (decided in 1987). As a matter of jurisdiction, the Court of Appeal has held that decisions of the Panel should be open to judicial review - principally because the Board performs a public duty as an integral part of the UK's financial regulatory frame-work - but that the Panel's decisions are to be made and will be binding unless and until they are set aside by a Court.

And, in relation to appeals made to the courts during the course of a bid, the courts have accepted that generally they will only intervene retrospectively, by way of declaratory orders, thereby allowing the Panel's decisions in the instant case to stand. To put it in other language, the relationship between the Panel and the courts is said to be historic rather than contemporaneous. And so, with that brief digression, may I now tie that in with what I have said about the characteristic of "certainty".

If the courts are prepared to take that view of their role, then, as I have said, the business community can rely with confidence on the ruling made either by the Executive or, an appeal, by the Panel itself.

Then there is the fourth characteristic: "Speed". I have already spoken, by implication, of this vital aspect of the Panel System: but it is appropriate to emphasise its importance as a separate characteristic. The Panel takes the view that, in the ordinary way, a bid should normally either go "unconditional as to acceptances" within 60 days or that it should then lapse. The underlying thinking is that the management of a target company should not be distracted from its central commercial purpose by bids which might otherwise run on and on, and on.

There will be bids with which you will be familiar, involving other countries in the European Economic Community which have run on and on, and which cannot have been good commercially for either company. So, it becomes important to ensure that, within that 60-day period, any disputed points of interpretation should be settled as quickly as possible, and that the timetable is not disturbed more than is absolutely necessary. It is in this context that it becomes so important that rulings of the Executive should be given within a

few hours, and any appeals should be determined within a matter of a very few days; and that there should be no realistic possibility of tactical delaying litigation.

So much, then, for the characteristics of the Panel system: Advance Consultation, Flexibility, Certainty and Speed.

Jurisdiction and Effectiveness

The jurisdiction and effectiveness of the Panel has been recognised by successive Governments, either implicitly or explicitly, over the years. When the Panel was set up, in 1968, it was established under the auspices of the Bank of England, and with Governmental approval. In 1980, the Wilson Committee reviewed the functioning of City financial instutions. It found no reason to question the efficiency with which the Code was administered by the Panel; and it acknowledged the Panel's considerable success in transforming the unregulated "jungle" which had existed before 1968.

The Licensed Dealer Rules, which preceded the Financial Services Act 1986 contained no detailed provision about takeovers. The Department of Trade and Industry had said, in 1983, that it was considered better to rely on the effectiveness and flexibility of the Code. It was also Government policy that the Panel should remain a non-statutory body when the time came to construct the new framework for regulation - the framework which was in fact established by the Financial Services Act, 1986. Following a Review in 1987, by the Department of Trade and Industry, the Bank of England, the Treasury, the Stock Exchange, the Securities and Investments Board, and the Panel, it was decided that the Panel should remain a non-statutory body. But at the same time, the Panel was given significant statutory "buttressing", both in terms of the sanctions available for a failure to comply with the Code, and in terms of its investigative powers.

As a result of the 1987 Review, the Securities and Investments Board (the SIB) and relevant self-regulating organisations (the SROs) may take compliance with the Code into account in deciding whether or not a person is "fit and proper" to be authorised to carry on investment business. The SIB and relevant SROs also have "cold-shouldering" rules, which may require persons and firms, who need to be authorised, not to act for anyone whom they have reason to believe would not comply with the Code. These measures provide welcome reinforcement for the Panel's authority. But it is worth noting that it has only once been necessary to trigger the "cold-shouldering" mechanism - and that was in 1992.

The Panel's traditional sanction of public censure remains a powerful deterrent against non-compliance with the Code. Another result of the 1987 Review is that the Panel is now designated (for the purposes of Section 180 of the Financial Services Act) as an authority to whom restricted information may be disclosed by the Securities and Investments Board, by the Stock Exchange, and, in respect of information which the Department of Trade and Industry obtains under Section 447 of the Companies Act, the DTI. So much, then, for an outline of the framework within which the Takeover Panel operates.

Workload

What of its workload? There was, as I have already mentioned, a period of intense takeover activity in the mid-1960s. It was indeed this period of activity, and the practices which were then adopted by some, which gave rise to increasing concern about those practices; and so to the publication of the Code and the formation of the Panel to monitor the Code. Then, there was a further period of intense activity in the late-1980s, with many cases providing headline financial news. For the moment, and coinciding with the recession, there has been a slackening of takeover activity, both in the number of takeover bids, and in their value. But it would be rash indeed to predict at this stage that there will not be a return, in the future, to the level of activity which we saw in the mid-1960s, or in the late-1980s. But what may be more doubtful is whether we shall ever see a return to the speculative hostile bids, funded by huge sums of money borrowed at high rates of interest: the so-called "Junk Bonds".

The Future

I should finally say a word about the future, and say it in the European context in which we all now operate. There is a European draft Takeover Directive which has now been around for some years. The Panel believes that the day may one day come when a European Takeover Directive may be appropriate for all member states of the European Economic Community; but we also believe that that day has not yet come. For better or worse, there has been more experience of takeovers in the UK than there has in any other country within the EC. Again, for better or worse, some of the other countries in the EC are now increasing their experience of takeovers, and they are learning - as we had to learn - a good deal in the process. What may appear simple and straightforward in theory often turns out to be very different in practice. And the experience of our European colleagues is, I believe, now tending to indicate to them the unwisdom, at least at this stage, of enacting any directive along the detailed lines which have so far emanated, in various forms, from Brussels.

There is a particular problem for the United Kingdom. I believe, as I hope I have already indicated, that by having a non-statutory system, we have the advantages which accrue from advance consultation, flexibility, certainty and speed; and this is so because the courts of the United Kingdom have indicated that their involvement will be historic rather than contemporaneous, so avoiding tactical litigation. But our European colleagues have great difficulty in understanding how any non-statutory system can ever work: it is wholly foreign to their experience and instinct.

The problem, for the United Kingdom, is that if a European Takeover Directive were ever to be enacted, it is difficult to see how adequate effect could be given to it, in the United Kingdom, without there being some form of statutory basis for the Code and the Panel; and if there were a statutory basis - as opposed to a non-statutory basis - then our courts might feel that they would have to take a different view of their present relationship with the Panel; and if this were to happen, then the essential beneficial characteristics of the system might be threatened by tactical delaying litigation.

It may be that the view will be taken that the concept of "subsidiarity" will be thought appropriate for the regulation of UK takeover activity. The communique issued after the Edinburgh summit, in December 1992, included the Takeover Directive amongst those directives proposed for subsidiarity treatment, but the implications of this are not yet clear.

The Panel's principal concern remains that, if there is a Directive which requires a statutory body to regulate takeovers and mergers in the United Kingdom, the tried and tested attributes of the Takeover Panel might be lost or at least rendered less effective. Whilst the Panel supports the concept of harmonisation, it wishes to ensure that the existing benefits of the UK system are not lost or diluted, and that there is not an increased risk of tactical litigation.

I believe that the City Code and the Takeover Panel, administering that Code, has provided a system which has shown itself to be effective over the last quarter of this century; and I would not wish to see its effectiveness diminished in the future.

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