



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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**JUDICIAL INDEPENDENCE IN A CHANGING
CONSTITUTIONAL LANDSCAPE**

**SPEECH TO THE COMMONWEALTH MAGISTRATES' AND JUDGES'
ASSOCIATION**

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INTRODUCTION

1. It is an honour and a privilege to speak this morning on "*Judicial independence in a changing constitutional landscape*" – as the constitutional landscape of England and Wales is still in the middle of great change. I hope very much that what I will say will accord with the overall theme of the conference – "*Independent Judiciaries, Diverse Societies*" – as the centrality of justice through an independent judiciary is the basis on which democracy, prosperity, fairness and the rule of law depend in our increasingly diverse societies.
2. Before turning to explain, by reference to my own jurisdiction of England and Wales, what I see as the key tasks that face the judiciary in achieving what I have described, I want to outline four key themes that underpin my address:

- i. *The centrality of justice to our societies and the independence of the judiciary cannot be taken for granted.* To all of us the centrality of justice to a State is obvious. The provision of justice is, we all know, a core duty of a State. But that is a view we should not take for granted. As judges we have a great deal to do to explain its importance and relevance. We have a key role as advocates actively to point out and explain the role and function of the judicial branch of the state.

Again the necessity for judicial independence is obvious to us all. We know it is central to the rule of law. In each of our nations, to a greater or lesser extent, we have to protect it or to fight for it.

- ii. *Strong judicial leadership and engagement is needed:* Judges cannot expect others to do all that is necessary to protect the position of the judiciary and the justice system; a proactive stance led by the judiciary is required. This is entirely compatible with the Latimer House principles and with other ethical duties.
- iii. *The judiciary must reflect society to maintain legitimacy:* The maxim, "Justice should not only be done, but must also be seen to be done", is ordinarily taken to require transparency, impartiality, fairness and propriety. But in a broader sense, it must also encompass the principle that the public needs to have confidence in the judiciary that serves it, so as to strengthen the legitimacy of the judicial process. It is axiomatic, therefore, that one important way of gaining and maintaining the public's confidence is making sure that the judiciary is reflective of society in its composition and in the issues it takes into account.

- iv. *Independence will be safeguarded:* In a changing constitutional landscape, each of the above is essential if the judiciary is to safeguard its independence in a way that enables it to uphold the rule of law for the benefit of each of our respective nations.

THE RELEVANT CHANGES

3. Constitutional change has been a long but generally slow process. Although we celebrate the 800th anniversary of Magna Carta, it was a very long time before the clauses to which we attach so much significance had any real effect. It therefore may seem initially strange that after a long period where the UK had seen little by way of constitutional change, it has since 1998 been in a period of rapid and continuing change. I would like to highlight four of those changes which are most relevant to the position of the judiciary:

- i. *The structure of the Union of the four nations: the position of Wales.* Scotland has always had its own court system, as has Northern Ireland. Thus the re-creation of legislatures with full law making powers in devolved fields could easily be accommodated. Wales has not had its own court system since 1830. Although the effect of the grant of full law making powers in devolved fields in 2011 has taken some time to work its way through, the unitary court system of England and Wales is having to adapt to administering laws passed by two different legislative bodies, one of which legislates bilingually.

- ii. *The status of fundamental rights:* Although it can be said that the courts of the UK have always recognised through the common law the fundamental nature of some rights, the period since the coming into force of the Human Rights Act has gradually highlighted the difficult role that the courts are called upon to play outside the traditional areas of the protection of personal liberty, protection of property and free speech and the right to a fair trial.

- iii. *The relationship with the European Union and its Court of Justice and the European Court of Human Rights:* Although the UK has been a member of the European Union for over 40 years and of the Human Rights Convention since its creation, it has taken time for the influence of EU legislation and the interpretation of that legislation and the Union Treaty to have a broad impact outside trade and business law.

- iv. *The governance of the judiciary and its relations with the other parts of the state:* It is to this topic I must turn in more detail to explain the key themes.

The position of the judiciary

The tradition in England and Wales

4. Until 2005, the Lord Chancellor – an ancient Office of State that had existed since at least the eleventh century – was the Head of the Judiciary with extensive powers in relation to the judiciary. With at least nominal disregard for the separation of powers, he was also the Speaker of the House of Lords and a senior member of the Government cabinet.

However anomalous it might have been, the office was the “buckle or linchpin”¹ between the judiciary and the other two branches of the State. It gave the judiciary a certain degree of comfort and stability. The holder of the office had for some centuries been a lawyer of great distinction who also had significant political experience. Judges could therefore generally leave to him (and it always was a him) the relations with the other branches of State, ensuring the position of the judiciary on issues was understood at the highest levels of government: the delivery of reform, the appointment of judges, their dismissal and most functions relating to the organisation of the justice system and the judicial branch of the State. It was a relatively comfortable position.

5. However by the end of the last century, this position was already under strain and all of this changed with the passing of the Constitutional Reform Act 2005² which in addition to other major changes (in particular the creation of the Supreme Court of the United Kingdom³ in place of the Judicial Committee of the House of Lords) recast the office of Lord Chancellor and the organisation of the judiciary.⁴ A decade later, even though changes are continuing, it is possible to assess the very different position which the judiciary of England and Wales now has.

¹ G. Gee, R. Hazell, K. Maleson, P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution*, (Cambridge) (2015) at 31.

² Constitutional Reform Act 2005 (c.4).

³ *Ibid.* at section 23(1).

⁴ *Ibid.* at Part 2.

Governance

6. The legislation made the Lord Chief Justice the Head of the Judiciary and President of the Courts of England and Wales in place of the Lord Chancellor.⁵ Vested in the office of Lord Chief Justice were very considerable powers and responsibilities over discipline, deployment, training, welfare and duties including making representations to Parliament and government.⁶

7. Having transferred these various powers, responsibilities and duties for organising, leading and representing the judiciary from the Lord Chancellor to the Lord Chief Justice, the Act was otherwise largely silent about *how* these responsibilities should be discharged by the Lord Chief Justice. This was deliberate, at least on the part of the judiciary, as it left to the judiciary the opportunity to create its own leadership and governance structure. What is evolving is a system under which the general policies of the judiciary are by and large arrived at through the Judicial Executive Board,⁷ a group of 8 or 9 senior judges chaired by the Lord Chief Justice, with the advice of the Judges' Council,⁸ a long established body which was recast to bring together the various judicial associations of the different types and levels of judge. The Judicial Executive Board or individual judges who, acting on behalf of the Lord Chief Justice, lead on matters ranging from diversity and relations with the regulator of the legal professions to training and international relations implement the policies. Whereas in the past all judges were by and large concerned with discharging their judicial function, at senior levels in particular – but also throughout the various tiers of courts and tribunals judiciary – the judiciary of England and Wales has had

⁵ Ibid. at section 7(1).

⁶ Ibid. at sections 5(1) and 7(2).

⁷ See <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judicial-executive-board/>.

⁸ See <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judges-council/>.

to create and refine a new leadership structure for itself, trying to avoid the clashes that can easily arise given the hierarchy that is the basis of the distribution of court work and the appellate structure. Its own civil service, the Judicial Office of England and Wales, supports the leadership judiciary.

8. The last is essential, as the principal task of all judges is to dispense justice through managing and trying cases or hearing appeals; any activity of an administrative or leadership nature, however important, is time spent away from court. Of course, that is not to say that judges should not undertake such activities – on the contrary, they should and they must – but it must be proportionate and they must be able to rely on the strong support of the Judicial Office to implement matters on their behalf.
9. In addition to a host of other statutory functions that transferred from the Lord Chancellor to the Lord Chief Justice as a result of these changes, of particular importance for my talk is a statutory duty⁹ placed on the Lord Chief Justice in 2013 to take such steps as he or she considers to be appropriate for the purpose of encouraging judicial diversity, a topic to which I will return.

Residual powers of the Lord Chancellor and court administration

10. The major changes, however, preserved some of the responsibilities and functions of the Lord Chancellor who is now also Secretary of State for Justice, though they have been the subject of yet further change. For example, judicial discipline is a joint function of the Lord Chief Justice and Lord Chancellor (as representing the public interest); appointments are the function of an independent appointments commission, though appointments to some leadership posts are a joint function of the Lord

⁹ Ibid. at section 137A.

Chancellor and the Lord Chief Justice; each also has powers to reject candidates for good reason.

11. One of the most important functions that was preserved was the responsibility of the Lord Chancellor to obtain the funds for the court administration. In a complex agreement reached in 2008 between the judiciary and the Government, the judiciary obtained a small role in the allocation of funds by the Finance Ministry and, more importantly, a joint responsibility for the running of the court administration. The court administration is now operated on a day-to-day basis by a board chaired by an independent person, accountable to both the Lord Chancellor and the Lord Chief Justice. The judiciary therefore takes a far greater role than before. This has been a beneficial change, given that the judiciary can utilise its practical and operational insight. The judiciary has been active in analysing practices, considering, initiating and evaluating reform proposals and driving the implementation of reform.

Relations with Parliament and the Government

12. Although the Lord Chancellor and other ministers are bound to uphold the rule of law and judicial independence, and indeed the Lord Chancellor's traditional oath has been adapted to reflect those responsibilities¹⁰, the judiciary now have, of necessity, adopted a much more active role in relation to government and Parliament.

13. There are regular meetings between leadership judges and the government. In addition, informal engagement occurs almost continuously between the civil servants in the Judicial Office and their counterparts in the Ministry of Justice and other government departments.

¹⁰ Ibid. at section 17, which inserts a new section 6A into the Promissory Oaths Act 1868 (c.62).

14. There is formal engagement with Parliament as illustrated by the Lord Chief Justice's Annual Report, which is laid before Parliament,¹¹ and annual appearances by the Lord Chief Justice before Parliamentary Committees shortly after its publication, as well as *ad hoc* appearances by other members of the judiciary that also form part of this formal engagement.

Conclusion

15. The result of these major changes to the position of the judiciary (as Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien have correctly concluded in a recently published study, *The Politics of Judicial Independence in the UK's Changing Constitution*)¹² has produced a paradox. Under the system prior to 2005, judges could rely on the Lord Chancellor, a member of the executive and legislature, to protect their independence and did not have to engage with those other branches of State. Under the new system, which has produced a clear and formal separation of powers, judicial independence is best served by more, not less, day-to-day engagement with government and Parliament. It has also necessitated a much more proactive stance by the judiciary in promoting an understanding of the importance of justice and in taking more proactive steps in many areas it might traditionally have left to others.

16. Thus we can see that, in the changing constitutional landscape, this new approach is necessary to protect judicial independence, particularly in securing adequate resources for the justice system and in explaining to the public why it is a judge's duty to make decisions in accordance with law in a way which might not appear at the time to be in accordance with popular sentiment.

¹¹ See https://www.judiciary.gov.uk/wp-content/uploads/2014/12/lcj_report_2014-final.pdf.

¹² See Note 1.

THE CENTRALITY OF JUSTICE: THE PUBLIC'S UNDERSTANDING

The perception

17. As I have mentioned, as judges and magistrates, we all understand the importance of the system of justice. In Europe, and I can only speak first hand of this, the public tends to take the provision of justice for granted. Most will never need to rely directly on the system of justice. The court systems by and large seem to work and are perceived to uphold the rule of law. With varying degrees of speed, those who are alleged to have committed crimes are tried and their guilt or innocence determined. Government is generally held to account by the courts and rights by and large protected and developed. Judges generally command a very high degree of trust; not only is this evidenced by surveys, but by the fact that politicians often turn to judges when they need an independent public examination of a difficult problem. The public do not readily see the serious problems that face the system of justice, such as the inordinately high cost of using the courts, which puts access to justice out of the reach of most, and a system that has not been modernised so as to meet the needs of ordinary citizens (whether or not as litigants in person) and SMEs.
18. Across Europe, governments face increasing pressures to curtail expenditure. The competing pressures are well known. In the United Kingdom, as in many other countries, we have since the financial crisis in 2008 lived in a time of austerity and restricted budgets. The inevitable consequence of these measures is a reduction in State expenditure on justice.

19. Indeed many see the courts and the court administration – its buildings, people, and resources – as yet another public service in the way that schools, medical practices and infrastructure are public services, rather than as central an aspect of the State as Parliament and the Government. At a time when the control of expenditure is under pressure, the benefits of spending on education, health and infrastructure are obvious, but the benefit of spending on justice and its modernisation, and the remedying of its problems, are not.

The lack of knowledge

20. Moreover the work of the courts, tribunals, and judges remains a mystery to so many. Any understanding is unlikely to be aided by its portrayal, or the portrayal of the legal system more broadly, in the media. However, given that much of the court estate belongs to a different era and court processes and procedures are blighted by often unnecessary convolution, not to mention the complexity of the law, such mystery is perhaps unsurprising.

21. And it is not only the public at large that is unfamiliar with the work of the judges. There can also be a lack of understanding in both the legislative and the executive branches of the State of the important and central role that justice equally plays.

Our task

22. As a result of the changes to the constitutional position, and particularly in these times of reducing budgets, never has it been more important for the judiciary, as an institution, to become more outward-looking and play a more educative role within the proper confines of the Constitution. In particular, judges in England and Wales have to explain the centrality of

justice and what is necessary to ensure that the courts can deliver it. Judges have to be active in relation to decisions concerning the adequate provision of judges and court administration and explaining why these go hand-in-hand with maintaining judicial independence and defending the rule of law.

LEADERSHIP IN ENGAGEMENT

Explaining why justice matters

23. Arguments about abstract, albeit important, principles concerning the constitutional significance of an independent judiciary will, without more, likely fall on deaf ears. Justice and judges must be, and must be seen to be, relevant. And it is for the judges to explain their relevance. By way of simple illustration drawn from the UK:

- i. *Relevance to small traders:* Civil claims with sums in dispute in excess of £10,000 (US\$15,000) will, most likely, be heard in England and Wales on the fast track of the County Court. Imagine you are a sole trader or small business – a builder, a manufacturer, a supplier of some sort – and you have unpaid debts totalling £15,000 (US\$23,000). That sort of debt could have a serious impact on your cash flow and might, in turn, cause you issues with your creditors. A year to resolve the issue through court proceedings might be several months too many.¹³
- ii. *Relevance to investment and the financial markets:* Investment will not be made and financial markets cannot operate without an effective and independent system of justice. In the UK, there is

¹³ See *Civil Justice Statistics Quarterly, England and Wales, April to June 2015* (Ministry of Justice).

an additional factor, as the UK legal services market generated £22.6 billion (US\$34.5 billion) for the economy in 2013.¹⁴

- iii. *Social relevance:* Often when the justice system appears in the media, it is about very, very sensitive issues that are of concern to many: serious crime, taking children in care, eviction, deportation, bankruptcy. Few people would *choose* to have anything to do with the justice system at all, but it is important to make clear that a just and fair society requires an efficient and expeditious system of justice.

- iv. *Constitutional relevance:* Lastly, the principled arguments must be aired, but not in the abstract. Access to justice matters. It matters because courts and tribunals are the means by which individuals are able to assert their rights against others, against the government, for each has equality before the law. An accessible and timely system of dispensing justice is required; otherwise the rights become meaningless. Acting with independence, judges are guardians of the rule of law and serve as a check on the exercise of executive power as part of the complex system of checks and balances that underpins our modern democracy.

24. How is this to be done – making speeches, engaging with the media through the Judicial Press Office and bringing those that need to understand the courts into the courts to see the work that judges do. One scheme that has recently been launched places Members of Parliament in courts or tribunals to observe hearings, with the opportunity of discussing the judicial process with the judge.

¹⁴ *UK Legal Services 2015* (TheCityUK) (2015)

Engaging in ensuring effective delivery of justice and bringing about judge led reforms

25. Explaining why justice matters is not in itself sufficient, unless the judiciary also ensures that, within the resources provided to it, justice is delivered effectively and, where reforms are needed, reforms that judges can initiate are initiated by the judges.

26. It is not easy to ensure that the courts within a State are acting effectively, but it is, in my view, essential for the leadership judges to monitor closely the time different types of case take, the time that elapses before a case can be tried, the number of interlocutory hearings that take place, the workload individual judges bear and the time that judges take to deliver judgments.

27. Inevitably in a time when technology is advancing at an ever-increasing pace, court systems need reform to keep pace and to develop more cost effective ways of delivering justice and modernising procedure. The judiciary has taken the initiative in establishing new courts (a planning court and a financial court for international markets) and in making extensive procedural reforms, even though constrained at present by the funds necessary to take proper advantage of modern technology.

28. All of this assists in instilling confidence in the judiciary and the justice system. In particular, improved awareness of the everyday and constitutional role of the judiciary, the ability to assert rights, and how to access justice is itself protective of the rule of law. In addition, as public understanding of the role of the judiciary and the justice system increases, so too will understanding of the need for their independence to be protected.

Judicial engagement and assistance in reform that is the province of the government and Parliament

29. However, there are many areas of reform that are not for the judiciary, but are properly for the executive and legislature. Some might say that once it is accepted that the particular matter is not within the scope of what judges can properly do on their own, then judges should leave matters entirely to the executive and the legislature.

30. I do not agree. The judiciary has a real role to play in offering what I have described as technical advice. There will often be choices that are for the politicians to make, but that is not to say that the technical feasibility of reforms are matters on which judges should not assist by giving advice. Guidance about assistance to Parliament has been issued,¹⁵ and, as a result of a series of seminars with senior civil servants, further Guidance will be issued later this year about appropriate engagement with the government on policy matters.

31. There are many other illustrations which time does not permit me to give. But you may ask why the judiciary should do this. The answer in my view is clear – our changing constitutional landscape has necessitated this to safeguard and to reinforce the centrality of justice and an independent judiciary in the proper functioning of a State.

¹⁵ See https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf.

DIVERSITY

32. Doing all of the above will, in my view, not be enough. We also actively engage in ensuring that the judiciary itself and what it does reflect our increasingly diverse societies.

Judicial diversity

33. In the past ten years there have been major changes to the judicial appointments process. An independent Commission that is required to appoint on merit now runs it.¹⁶ The judiciary is working actively with the appointments commission in increasing judicial diversity, in particular to remove the barriers to entry to the judiciary and open-up applications to the widest pool of candidates.

34. In 2013, a Judicial Diversity Committee was established to assist in discharging the duty to encourage diversity of which I have spoken. We have put in place 90 Role Model Judges who undertake outreach and mentoring work; we hold specialist outreach events targeted at underrepresented groups; we have organised a specialist mentoring scheme for first-time judicial applicants or those seeking to progress to higher office. We put in place this summer a scheme to encourage, through mentoring, a much wider pool of applicants for appointment as deputy High Court Judges and early appointment to the High Court Bench.

35. We are beginning to bring about a change, particularly with appointments of female judges, but there is still a great deal to do.

¹⁶ Constitutional Reform Act 2005 (c.5), section 63(2).

36. We also have Diversity and Community Relations Judges across England and Wales. Beyond diversity work with aspirant judges, they actively seek to dispel myths surrounding the judiciary and act as a link between the courts and local communities. In addition, they play an important role in informing and educating people – communities, schools, universities – about the reality of what it is to be a judge, which helps to remove the myths and misconceptions that prevail. We have recently increased the number to 123.

Cultures and languages

37. I mentioned at the outset the changes in the Union of the nations that form the UK. May I illustrate this by reference to Wales. Legislative and constitutional changes have given Wales a legislature and restored Welsh as a language of the courts and of legislation after an interval of over 400 years; these changes and other factors have restored Wales as a nation with a more distinct identity within the unitary system of England and Wales. On many different levels, the judiciary has therefore made changes to the operation of the legal system to reflect the constitutional change.

Legal systems and common cultural problems

38. I also mentioned the impact of our membership of the EU. This means not only a parallel, though much more occasional, dialogue with the institutions of the EU, but for present purposes a readiness to understand and adapt to cultures and legal methods different from that of the UK and the common law. Of the many examples, may I take victim's rights? Most continental civil systems have a very different investigative process, but also accord to victims many more rights, such as the right to appeal against the failure of the prosecutor to prosecute. Political decisions were made to try and provide the same minimum rights for victims across Europe. Technically

difficult though it was to set minimum rights, what proved to be more difficult was addressing the common cultural problem that each state had - the failure to keep victims informed throughout the whole process of what was happening and to take into account their concerns when dealing with cases. Thus although we may have to reconcile the diversity of legal systems, it is sometimes common cultural problems that the judiciary and the broader legal system needs to address.

CONCLUSIONS

39. So, what conclusions can be drawn?

- i. Judicial independence must not mean judicial isolation;
- ii. The judiciary must explain the centrality of justice and why it matters. That task cannot be left to others. Transparency and openness are crucial to instilling public confidence in the justice system. In so doing, the emphasis has to be on demonstrating the real-life impact, rather than relying on high-level constitutional principles;
- iii. The judiciary needs to engage with the other two branches of State within the confines of the Constitution, and this strengthens, rather than undermines, judicial independence as it increases shared understanding and shared respect;
- iv. Engagement with the public and the other branches of the State is particularly important when it comes to protecting judicial independence and the proper funding of justice;

- v. The judiciary must be reflective of the society it serves and actively take steps to ensure that the processes of the courts take proper account of our diverse societies.

40. Although I have spoken of England and Wales, I anticipate that much of what I have said about the need for judicial engagement will be of much wider relevance.

41. Thank you very much.