



JUDICIARY OF
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JUSTICE FOR THE 21ST CENTURY
CAROLINE WEATHERILL LECTURE

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(1) Introduction¹

1. It is a real pleasure to be back in the Isle of Man and to a jurisdiction for which I have a real affection. Not only have I sat as a deputy Judge of Appeal, standing in for Ben Hytner when he was unavailable but, in addition, I sat as a deputy Deemster to re-try a young man charged with murder in the first case on the Island which followed the formal abolition of the death penalty: the weeks that I spent here were challenging and a very real responsibility but also fulfilling: they provided part of the impetus which led me to pursue a judicial career in England. It is also a real honour to have been asked to give this year's Caroline Weatherill lecture and in doing so, I reflect on the tragedy that was her death in 2006. In the circumstances and given all that is happening on the legal scene in the UK, I thought I would take as my subject Justice for the 21st Century. Some might say that in 2015 I may be a little behind the times. I would not, however, be the first judge to be described as being behind the times and neither would such a comment be the most offensive thing that had ever been said about me!
2. In my defence, I would suggest that we are only just in the foothills of the century, and there's a long way to go to the summit. More prosaically, if I can anticipate what future

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

historians may conclude, I have a feeling that just as some say that the 20th Century really began with the First World War, the 21st Century's real beginning may well not be marked by the year 2000. On the contrary, its beginning may well be marked by the advent of SMART technology, by the iPhone and Android in your pocket. From the perspective of the courts in England and Wales, this coincided with a period of significant constitutional reform from 2004 onwards.

3. With this in mind I want to consider some of the ways in which both technology and constitutional reform may shape the development and delivery of justice over the coming century. In particular I want to focus on three specific aspects. First, I want to consider the changing nature of the judiciary. Secondly, I want to look at the separation of judges from politics. Thirdly, I want to consider the effect of technology on the courts.

(2) Judges and the Constitution

4. Before turning to my substantive points, I want to start by looking at judges and the constitution. The UK's constitution has grown over time. It is the product of organic growth rather than, as in the United States, Germany or France – for instance – the product of a singular event. That is not to say that those countries that have written, codified constitutions are governed solely by their terms. Constitutional practice and convention evolves over time. Constitutional clauses are interpreted and explained by the courts. And over time they can be and are amended. Organic growth, evolution, is as much a part of codified constitutions as it is an uncoded one.
5. The central difference between the two types of constitution is however the ease by which fundamental, constitutional change can be effected. Constitutional evolution in the US, for instance, is carried out against, and is limited by, the written terms of the Constitution as interpreted by the Supreme Court which itself could provide a measure of flexibility to the

document. Fundamental change is a matter for formal amendment by the introduction of new clauses or the removal or qualification of existing ones.

6. Things are easier, superficially at least, in the UK. Fundamental change can simply be effected by Act of Parliament or in some cases by the modification or replacement of constitutional convention. Why superficially? There are two reasons why things are not as straightforward as they might be thought to be. The first is political. There may be no political commitment to, or consensus, for change. The second is cultural. Where constitutions are concerned there can be a tendency towards conservatism, with a small 'c'. There can be a view that things are as they should be, and therefore ought to be left in their present state of perfection: *'all is for the best in this, the best of all possible worlds'*². It is a view that implicitly at best denies *'the possibility of political and intellectual progress.'*³ It is one, which Thomas Jefferson – who knew a little about the evolution of constitutional settlements, rightly criticised the tendency of some to, as he put it, *' . . . look at Constitutions with sanctimonious reverence, and deem them, like the ark of the covenant, too sacred to be touched . . .'*⁴
7. Over the last twenty years the UK constitution cannot be said to have remained untouched. Devolution, reform of the House of Lords, the transformation of the Law Lords into the UK Supreme Court, the introduction of fixed-term Parliaments: these are a few of the ways in which it has been altered fundamentally. Furthermore, the courts and judiciary of England and Wales have not been left out of the process and it is highly unlikely that they will be left out of future reform. Let me outline a number of those reforms, past and future, and their consequences.

(3) Judicial Appointments – the changing nature of the judiciary

² Voltaire, *Candide*.

³ J. Meacham, *Thomas Jefferson – The Art of Power*, (2012) (Random House)

⁴ Cited in *ibid.* at 467.

8. First, judicial appointments. Until 2006 our appointments system was, to put it mildly, shrouded in secrecy. Its origins probably derived from the fact that all appointments were of barristers most if not all of whom would have been known personally by the Lord Chancellor which, of course, gave rise to the risk of cronyism. More recently, the system depended on taking soundings from a large number of the senior and supervisory judiciary after which the Lord Chancellor would determine who was to be appointed. Until Lord Irvine's tenure, future judges to the High Court would not know of their elevation to the Bench or promotion from one court to another until they received an invitation to see the Lord Chancellor. An application form was then introduced, but Lord Irvine reserved the right to tap a high flyer on the shoulder. This approach may have been justifiable at one time on historical grounds: that's the way it's done because that's the way it's always been done. Such a justification has all the hallmarks of the approach I noted earlier that Jefferson rightly criticised. In any event, the size of the potential pool and the differing role of the Lord Chancellor together with its lack of transparency meant that it had to change.
9. The Constitutional Reform Act 2005 revolutionised the system. As a consequence, we now have an independent appointments body – the Judicial Appointments Commission or JAC. Would-be judges must all now apply for appointments, rather than wait in hope for the telephone call. Appointments are now on merit⁵; there is no question of previous abuses namely that the individual concerned was related to the Lord Chancellor or was a politician, as was the case in Lord Halsbury's time⁶; or, that you were, as Professor Malleson once put it, an *'elderly, white, male [barrister] educated at [a] private [school] and at Oxbridge'*⁷.
10. The rationale for the change was both principled and practical. A number of points sounded on the side of principle. First, it is a fundamental aspect of fairness that our appointment

⁵ Constitutional Reform Act 2005, s63(2).

⁶ J. Heuston, *Lives of the Lord Chancellors (1885 – 1940)*, (Clarendon Press) (1964) at 36.

⁷ K. Malleson, in Malleson & Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, (University of Toronto Press) (2006) at 42.

process should afford aspiring judges equality of opportunity. Appointment in the eye of a single beholder, as it was prior to 2005, cannot be said to have achieved that. Secondly, the judiciary is one of our institutions of governance. Appointment to it should be available to anyone who is properly qualified. Again, the pre-2005 appointment process was not able to secure that aim. Third, an open appointment process is, it seems to me, the best means to demonstrate that the judiciary as an institution is one that is properly part of an inclusive society, rather than one that stands apart from it. And in this way it is the best means to maintain public confidence in the courts. A judiciary that is drawn only from a small section of society, would be one that would struggle to maintain its legitimacy. Open, successful, societies are those in which all its members have a stake, all may play a role in government, whether judiciary, Parliament or executive.

11. On the practical front, and here there is an obvious link back to the principled points, an open and transparent process is one that is best able to secure appointments from the widest pool of talent. It is the best means to appoint the best judges. Let me be clear, this is not to suggest that prior to 2005 our judges were not of the highest quality. They were and are. It is to say that greater competition across a wider pool of talent enables us to improve on the best; it makes the best strive to be better. Of course, widening the pool may make it more difficult for some to achieve an appointment, which under the old system they may have received easily. That difficulty is however a reflection of the fact that the bar has been raised, competition is fiercer and, everything else being equal, the quality of appointments cannot but be getting better and better. It is a difficulty we should embrace; it is one born of fairness and a commitment to ensure that our judiciary is the best it can possibly be.
12. In this regard the question turns to judicial diversity. Increasing diversity has, as is well known, been a long-term aim of the judiciary. This aspiration is principled because it is an aspect of ensuring that the judiciary is properly reflective of society, that it is properly open

to all on grounds of merit, and it is practical because it cannot but improve the quality of justice. Lord Taylor, when Lord Chief Justice, as long ago now as 1992, expressed the determination that within ‘*a few years*’ gender and ethnic diversity amongst the judiciary would no longer be as imbalanced as it was then.⁸ We still have far, too far, to go. But things are improving. In an interview, Alexandra Marks, who rose to be a partner of the prestigious solicitors Linklaters and is both a deputy High Court judge and member of the Judicial Appointments Commission, has made the point that between 44% and 52% of all recommendations made by the JAC for judicial appointments are currently women.

13. It is fair to say that this is mainly reflected in the lower ranks of the judiciary and it is well known that only one member of the Supreme Court is female and none of the Heads of Division are female although two (out of nine) sit on the Judicial Executive Board which is chaired by the Lord Chief Justice and is the senior management body for the judiciary. But looking at the other ranks of the senior judiciary, the picture is changing. To give you an idea – and in doing so I am mindful that this is simply a snapshot – in 2001, 6.1% of Court of Appeal judges were female⁹, in 2006 – the year after the new process was enacted, the figure was 8.1%¹⁰. By 2011, that figure had become 10.8%.¹¹ The latest figures, from 2015, show that 21% are female (that is to say 8 out of 37).¹² Comparable figures from the High Court are: in 2001, 8.1% of judges were female; in 2006, 10.2%; 2011, 15.7%; and 2015, 19%. The trend is obvious and as more obtain appointment, so more will, I believe, be prepared to apply.

⁸ Taylor (1992) cited in The Report of the Advisory Panel on Judicial Diversity 2010 (Ministry of Justice) (2010) (<http://www.justice.gov.uk/publications/docs/advisory-panel-judicial-diversity-2010.pdf>) at 59.

⁹ <https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2001/>

¹⁰ <https://www.judiciary.gov.uk/publications/annual-ethnicity-statistics-2006/>

¹¹ <https://www.judiciary.gov.uk/publications/annual-diversity-statistics-2011/>

¹² <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2015/>

14. It is also worth making the point that in the five years to come, there are a large number of inevitable appointments, even assuming that every judge continues until his or her compulsory retirement date. In that period, all nine of the English members of the Supreme Court will fall to be replaced as will four Heads of Division and at least 12 members of the Court of Appeal. That is 25 appointments. In addition, there will be many appointments to the High Court. For my part, I anticipate that a substantial number of these appointments will be of women and that progress will also be made in the area where we do not do anything like as well, namely in relation to black and ethnic minority practitioners.

15. The picture, therefore, is one of slow, steady improvement in the years immediately following 2005, with increasing, steady improvement in the Court of Appeal and High Court since then. But I recognise that progress has not been as great as might properly be expected. Improvements need to be made. Complacency or worse is unacceptable. Why has improvement at the higher levels of the judiciary not been better and equivalent to those at the lower ranks? The rate of increase is, it seems to me, a product of many factors, some of which are as follows.

16. First, the attrition rate: new appointments can only be made when a serving judge retires. This places an absolute limit on recruitment and we have been passing through a phase when the maximum retirement age has reduced from 75 to 70. Secondly, the new system has only been in place for a relatively short time, and thus has had a commensurably short time to effect change. There is little that can be done to overcome the first although an increase in availability of part-time positions in the High Court and above could prove beneficial here. The second has become less of a factor as time goes on.

17. Thirdly, we draw our judges from a divided profession and it has undoubtedly been more difficult for practitioners from the highest reaches of the solicitors' profession to take up the

initial part-time positions thereby gaining experience which provides helpful evidence to demonstrate the skills required for full-time appointment. The judiciary, the Law Society and the law firms are working to overcome this problem, by helping to remove the barriers that solicitors face in making applications and taking up appointments. The fourth reason often proffered is that the pool of talent from which appointments are made is reflective of entry into the legal profession thirty to forty years ago and of those individuals from that cohort who are now at the top of the profession.

18. I find this last reason less than convincing. It rests on the fallacy that, as the judiciary is drawn from the legal profession, it cannot but reflect the profession. There is absolutely no reason why this should be the case. It is an argument that suggests that if, for the sake of argument (and these are not actual figures), 30% of the legal profession at its highest levels are female, and the judiciary is drawn from the profession then only 30% of the judiciary can be female. Thus, the profession sets the bar.
19. This line of argument is an excuse not a justification. It fails because there are sufficient numbers at the highest levels of the legal profession. In this number I include all lawyers, whether private practitioners, government or in-house, as well as the academics: they could be appointable and be appointed on merit and would help to secure a properly diverse judiciary in the near future. Such individuals are within the profession now but how many actually apply? Suffice to say that the path to appointment must be and must be seen to be attractive to them; it needs to be secured.
20. Having said all that, let me make it clear that I am not talking about quotas which I believe are the antithesis of appointment on merit and demeaning whether to women or those from minority ethnic groups. Making allowance for career breaks or for the consequences of caring responsibilities is one thing: that is entirely justifiable because the assessment of merit

necessarily embraces potential but creating a principle of appointment not because of merit but in order to achieve gender or ethnic balance will inevitably lead to the inference that those appointments are most decidedly not based on merit alone.

21. But we simply don't need to go there. The Lord Chief Justice is very alive to the problem and has recently emphasised that we still have a great deal of work to do to improve judicial diversity¹³. We must get on with it to realise its benefits sooner rather than later. And we are taking those steps, whether it be through new schemes to widen entry into the High Court through the current deputy High Court Judge competition, through outreach, mentoring, judicial work-shadowing, flexible working patterns, and through early entry into the judiciary with a more clearly defined judicial career path. It is work in progress; it is an important one that we all as judges, lawyers, and members of society have a stake in realising. It is one that will yield a more diverse, a better, judiciary for the 21st Century and will do so now.

(4) The separation of judges from politics

22. The second significant change has been the increase in our formal, constitutional commitment to the separation of powers. Historically, our constitution did not pay as much attention to formal separation of powers as purists might have wanted. Our supreme court was a facet of the Upper House of Parliament, the House of Lords. Our supreme court judges, the Law Lords, could thus take part in the legislative process. Our government was also drawn from our legislature. The Lord Chancellor was judge, legislator, and member of the government.

23. The 2005 Act swept much of this aside. The Lord Chancellor was no longer to be a judge or head of the judiciary. The Lord Chief Justice took that latter role, along with a whole host

¹³ Lord Thomas, *Judicial Independence in a changing constitutional landscape*, at [33] – [36] <<https://www.judiciary.gov.uk/wp-content/uploads/2015/09/speech-lcj-judicial-independence-in-a-changing-constitutional-landscape2.pdf>>.

of other judicial-related functions. The House of Lords judicial function was transferred to a new Supreme Court. The Law Lords became Justices of the Supreme Court, and were barred – if they had a peerage – from sitting in the House of Lords while they held their judicial office.

24. We have now had ten years to adjust to these changes. Government and judiciary have, for instance, had to develop new ways of working with each other, as the Lord Chancellor no longer provided the historic, informal, link between the two. More formal lines of communication have had to be put in place, with regular meetings taking place between the Lord Chief Justice and the Lord Chancellor. The Lord Chief Justice appears on a regular basis before Parliamentary Committees to answer questions on the Constitution and Justice System; he provides an annual report to Parliament. Communication has not come to an end. It has evolved.

25. Equally, we have seen the evolution of a new civil service for the judiciary – the Judicial Office. These are civil servants who bring their expertise to bear to help judges in their efforts to manoeuvre through the thicket of administrative challenges in exactly the same way that their colleagues in Whitehall advise and assist their Ministers. With their assistance, judges have had to learn new skills and how best to work with the executive while, in turn, they have had to learn how to deal with judges. A new partnership had to be put in place to administer the courts. Prior to 2005 the Lord Chancellor, as minister and as head of the judiciary, was ultimately responsible for them. The new division of responsibility meant that only through the Lord Chancellor and Lord Chief Justice working together could they be properly administered.

26. A further consequence of the reforms was to insulate, to a greater degree than was previously the case, the judiciary from political issues. This is one particular area where our

constitutional settlement has changed markedly. At one time the multi-faceted role played by the Lord Chancellor was not unusual. Judges could be politicians and politicians could be judges. Lord Mansfield, one of our greatest Chief Justices, was for a considerable period while head of the Court of King's Bench in the 18th Century, an active member of the House of Lords and member of the government. At one time he was judge and Chancellor of the Exchequer. At another time he was judge and de facto Prime Minister.¹⁴ One of his successors, Lord Ellenborough, was – during the early years of the 19th Century – both Chief Justice and a Cabinet Minister. Looking a little further back, Sir Harbottle Grimston and Sir John Trevor were both MPs and Masters of the Rolls. The latter also being Speaker of the House of Commons, whilst Master of the Rolls.

27. 19th Century reform started to see a move away from this blurring of the lines. Major constitutional reform of the courts in the 1870s saw judges barred from sitting as MPs.¹⁵ No judge sought to emulate Lord Ellenborough. But still there was what might be called cross-fertilisation between Parliament and the judiciary: politicians could still, and in some cases would expect to become judges. Political experience as an MP was until approximately the 1930s often a prerequisite of appointment.¹⁶ Until Lord Goddard's appointment as Lord Chief Justice in 1946, the presumption was that the Attorney General had first refusal when that office became vacant. Political experience is no longer a pre-requisite, and in fact only one former MP is now a judge: Sir Ross Cranston. He was appointed under the post-2005 appointments process.

28. Broadly speaking a clear, long-term, trend is perceivable from the start of the 19th Century, one that incrementally created greater distance between the judiciary and politics. Until 2005, as I have said, the one major exception to that trend was the Law Lords. While the 19th

¹⁴ See N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill) (2013).

¹⁵ Supreme Court of Judicature Act 1873, s.9; Supreme Court of Judicature Act 1875, s.5.

¹⁶ J. Heuston, *Lives of the Lord Chancellors (1885 – 1940)*, (Clarendon Press) (1964) at 36.

Century saw judges barred from being legislators in the House of Commons and vice versa, judges remained legislators in the House of Lords. While it may have been the case that, at least from Lord Bingham's time as Senior Law Lord, a self-denying ordinance was in place, which stopped the Law Lords from taking part in certain of the House's legislative affairs, that was a matter of practice, of convention only. Law Lords could and, in some cases did take part, in political debates in the House.¹⁷

29. The 2005 Act brought this remnant of our constitutional history to an end. By removing the Law Lords from the House and establishing them as Justices of an independent Supreme Court and by barring judges who were peers from sitting in the House of Lords whilst they remained serving judges, the Act finally put an end to judges being legislators and legislators, judges. As Lord Steyn put it referring to the Supreme Court's creation, but equally applicable to the Law Lords removal from Parliament, the 2005 Act established '*a public constitutional badge of judicial neutrality and independence*.'¹⁸

30. In putting clear water between judges and political engagement, the 2005 Act can be seen to have achieved two things. First, it completed the constitutional trend that has been evolving since the start of the 19th Century. Secondly, in doing so, it complemented a long-standing constitutional convention concerning judicial comment on political matters. This is not to say that judges do not and cannot comment on political matters. They can and do make such comments quite properly where they concern the administration of justice¹⁹, the operation of the courts (for which, as I said, they have joint responsibility) or judicial independence²⁰. It is also not to say that judges cannot comment on political matters. By long-standing convention they can go further, but subject to two highly important qualifications. First, they

¹⁷ See, for instance, Lord Woolf CJ, HL Deb 09 December 2002 vol 642, cc.25 commenting on the Courts Bill 2002.

¹⁸ J. Steyn, *The Case for a Supreme Court*, (2002) 118 LQR 384.

¹⁹ S. Shetreet & S. Turenne, *Judges on Trial*, (CUP) (2nd edn, 2013) at 370.

²⁰ I. Judge, *Judicial Independence at Responsibilities*, (Hong Kong) (2009).

can do so provided they are not engaged in '*politically partisan activities*'²¹. Let me give you an example.

31. In the early 1970s the United Kingdom had been a signatory to the European Convention on Human Rights for just over twenty years. In 1974, Sir Leslie Scarman, then a recently appointed Lord Justice of Appeal, gave the Hamlyn Lectures. In the lectures, he suggested that the Convention might have become part of English law through the enactment of the European Communities Act 1972. He also suggested that means had to be found to incorporate the rights it contained into English law. He went further and suggested that those rights should be entrenched and form the basis of a new constitutional settlement, one in which the courts could strike down legislation.²²

32. At the time such comments were, political with a small 'p' in that they concerned matters of public concern or interest. No doubt they were thought to be controversial in some quarters then, but the comments were not politically partisan. They were an example of a judge discussing the possible development of one aspect of the law. Two years after Sir Leslie made his comments, the idea that he proposed, to a significant degree, formed the subject matter of a private members bill: the Bill of Rights Bill 1976. His comments were referred to in Parliament by Lord Wade as '*important observations*', as part of a '*general or at least widespread agreement about the need for something to be done in regard to the protection of human rights . . .*'²³ So not comments that could be construed as politically partisan, and hence within the ambit of the first qualification.

²¹ de Smith & Brazier, *Constitutional and Administrative Law*, (Penguin) (8th edn, 1998) at 375.

²² L. Scarman, *English Law – The New Dimension*, (Stevens) (1974) at 12 – 20; and see D. Neuberger, *Where Angels Fear to Tread*, (Holdsworth Lecture, 2 March 2012) for the alternative view that even at the time he delivered the Hamlyn lectures, Sir Leslie was treading on dangerous ground.

²³ Lord Wade, HL Deb 25 March 1976, Vol. 369, cc.775.

33. What about the second qualification? Let us assume for the sake of argument that rather than a private members bill the 1976 Bill had been a government bill. Let us further assume that it and its provisions were a matter of political controversy, that is to say that the government and opposition had taken clearly articulated, and opposing, stances to it and them. Sir Leslie had made his views known two years previously. Could he then, as serving, judge re-enter the arena? The answer to that question is no – serving judges should not, as de Smith & Brazier remind us, take ‘*sides in political controversy*’ not least where issues have become, as they put it, ‘*party issues*’.²⁴ Nor should they be seen to do so. What was potentially permissible when he gave the Hamlyn lectures would have been impermissible to repeat or expand upon later if the issue had become a matter of political controversy. As Lord Mackay LC put it, at the time he abolished the Kilmuir Rules, serving judges ‘*should avoid any involvement, either direct or indirect, in issues which are or might become politically controversial.*’²⁵

34. That remains the position today. A latter-day Sir Leslie would therefore have to remain and ought properly to remain silent today on matters concerning the present highly sensitive and political issue of human rights reform. In the same way, as a matter of constitutional convention, I was quite clear that it would have been quite wrong for me to comment on the arguments that flowed from the publication of the Report of the Inquiry which I conducted into the culture, practices and ethics of the press. Once published, like a judgment, it was a matter of public record and, although initiated on a cross party basis, as is well known, it became a matter of political controversy. It would thus have been improper for me to enter into post-publication discussion.²⁶

²⁴ de Smith & Brazier *ibid.*

²⁵ Lord Mackay LC, Letter to the Lord Chief Justice, dated 16 October 1998 cited S. Shetreet & S. Turenne, *ibid.* in at 362.

²⁶ See further, Lord Thomas CJ, *Written evidence to Select Committee on the Inquiries Act 2005*, at 437, and, *The Future of Public Inquiries*, [2015] P.L. (April) at 233.

35. What is the rationale behind the two exceptions? Why should a serving judge not take part in political activities, make politically partisan comments or comment on matters of political controversy? It needs little explanation. It is obvious. It is the same rationale that bars serving judges from being MPs, from sitting in the House of Lords or serving as a member of the government: to secure judicial, institutional, independence, and thereby maintain public confidence in the judiciary. A judge who enters the political arena is one who enters into an area of public life that is off-limits to the judiciary because judges have to be seen not to be taking a stance on issues that they may have to determine judicially. It is to confuse the judicial role with that of a legislator. It is to encourage the public to perceive the judiciary, whether rightly or wrongly, of acting with – to borrow from Alexander Hamilton – ‘*will*’ rather than ‘*judgment*’²⁷, as seeing their role as greater than that of upholding and developing the law through its proper application in their judgments.
36. The 2005 Act, operating in concert with the long-established constitutional convention that requires judges to steer clear of political activity and to keep their counsel on matters of political controversy, has finally brought our constitutional settlement to one where, subject to the court’s ability sensibly to develop the law as required by the common law or statute, ‘*judgment*’ is for the judiciary and ‘*will*’ is for the government and Parliament.
37. I add only that this does not mean that either the legislature or the public is deprived of the view of those who have held high judicial office on political issues. Once retired, the embargo is lifted and there are many examples of retired judges commenting upon politically controversial issues. Obvious examples within the legislature are Lord Woolf, former Lord Chief Justice and Law Lord, who has taken part in many debates in Parliament since his retirement as a serving judge, and more recently the last Lord Chief Justice, Lord Judge, who has also commented on matters that might be described as political concerning the European

²⁷ A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, (Signet), No 78 at 464.

Convention on Human Rights.²⁸ As a judge he did not do so. As a former judge and current and active cross-bencher in the Lords, he can and does properly do so as a legislator. Similarly, other retired judges have given lectures and written on matters of political controversy.

(5) Technology, courts and the constitution

38. The third topic that I would like to address is the effect that technological advances may have on the courts and constitutional reform. My starting point here is due process; a legal term introduced into English by the 1354 revision of Magna Carta²⁹. In this context at least, Due Process refers to the fundamental principles that underpin procedure within our courts, and which when taken together render it *'fair and right and just'*.³⁰

39. Across the common law world due process, or as it is also called, procedural justice or fairness, is constituted of a number of long-established interlocking principles. We all know what they are, even if we do not often have call to refer to them explicitly. They are in short, rights to an independent and impartial tribunal; to effective access to justice, which would encompass, amongst other things, to the right to receive privileged legal advice; to due notice of the proceedings and their content; to a fair hearing, where evidence can be presented and tested; to equality of arms; to open justice; and, to reasoned judgments based on the evidence and an application of the correct law.³¹

40. Our courts and our civil, family and criminal procedures have evolved consistently with those principles. The principles are inherent in them. By way of example only, our trial process is predicated on both parties having access to the other's evidence and being able to

²⁸ I. Judge, *Constitutional Reform: Unfinished Business* (UCL lecture) (4 December 2013) <<https://www.ucl.ac.uk/constitution-unit/constitution-unit-news/constitution-unit/research/judicial-independence/lordjudgelecture041213/>>.

²⁹ 28 Edw. 3, c.3.

³⁰ *Solesbee v Balkcom* 339 US 9 (1950) at 16 per Frankfurter J., '*Due Process is that which comports with the deepest notions of what is fair and right and just.*'

³¹ For a useful summary see, H. Friendly, *Some Kind of Hearing*, Univ. Penn. Law Rev. [1975] Vol. 123, 1267.

challenge it before the court. Legal proceedings, subject to limited exceptions that are themselves justified by other due process principles, take place in the open – any member of the public may, as a general rule, enter a court and watch what is taking place. In some cases they can now watch proceedings on television.

41. Our present court system and procedure have developed over centuries. The last great restructuring of our civil court structure took place towards the end of the 19th Century, when our courts were rationalised through consolidation into a single High Court and Court of Appeal. Our criminal court structure is very much the consequence of long evolution, in terms of our Magistrates' Courts, and reform in the late 1960s and early 1970s that saw the replacement of the Assizes and Quarter Sessions with a single Crown Court.³² The structures, and the buildings in which the courts operate, are thus very much a product of our history.

42. Times change. The most significant change that we have undergone in my time as a judge has been the development of the internet and digital technology: the digital revolution. The court system has not, as yet, fully taken advantage of it. It is fair to say that IT provision in the courts leaves something to be desired. That is slowly changing, and is likely to change at a greater pace in the near future. The Chief Executive of Her Majesty's Courts and Tribunals Service underlined that fact most recently. At a Criminal Justice Management conference, she noted that the courts had to be '*digital in design*'; that they had to move beyond the '*physical paradigm*'.³³ What might this mean? And what does it have to do with due process?

43. The answer to the first question can only be considered by reference to the answer to the second. It can because our commitment to the various due process principles cannot but inform the manner in which the new '*digital paradigm*' shall take, and as such it necessarily

³² See Report of the Royal Commission on Assizes and Quarter Sessions (The Beeching Report) (House of Commons, Cmnd 4153, 1966-69) was published in 1969; Courts Act 1971.

³³ N. Ceeney, as reported in Law Gazette, 23 September 2015, <<http://www.lawgazette.co.uk/news/courts-to-move-from-physical-paradigm-new-hmcts-chief/5051159.fullarticle>>.

limits its scope. It does because our commitment to due process is a part of our constitutional settlement: principles of due process are constitutional principles, a point highlighted for instance by the House of Lords in the famous decision on open justice – *Scott v Scott*³⁴ – and again by the House of Lords in the *Bremer Vulkan*³⁵ case, where access to the courts was noted to be a constitutional right. Whatever shape the future may take it must be consistent with these, and other such principles. Digital design could not therefore, provide that justice takes place outside the view of the public: it could not properly create a digital trial for a latter-day Kafka.

44. The contrary position ought to be – and no doubt will be – the touchstone of reform: digital design ought to enhance our commitment to due process. It should be utilised to make our justice systems – criminal, civil, family, tribunals – fairer and more just. One way in which that can be done is, as I recommended in my recent report on improving efficiency in criminal proceedings³⁶ and which is equally applicable to civil proceedings, is through greater use of digital technology during the pre-trial process. All cases should be capable of being filed online. Case progression, filing of documents should all take place online. There should be digital case files that the judge, court administration and the parties can access.³⁷ There should be a reduction in labour intensive paper processes, and a concomitant increase in efficiency and a reduction in cost both to the State and to litigants. Digitisation should thus serve to increase access to justice, due notice and the right to be heard in a reasonable time.

45. We should however take care here. Digitisation is predicated on ready access to, and an ability to use, digital technology. Not everyone has such access and can use it readily. We cannot assume the contrary, or assume that all litigants will have access to a lawyer who is able to navigate the system for them. We will therefore need to ensure that there are means

³⁴ *Scott v Scott* [1913] AC 417.

³⁵ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp. Ltd* [1981] AC 909 at 979.

³⁶ B. Leveson, *Review of Efficiency in Criminal Proceedings*, (Judicial Office) (January 2015).

³⁷ *Ibid* at 5 – 7.

available to enable such individuals to secure effective access; we are under a constitutional duty to do so. One way in which this could be done is to draw from experience in other countries. We might learn, for example, from approaches taken in France, where, as Lord Dyson MR, noted recently, a website provides access to the civil justice system, for a price of course, in a simple, straightforward manner.³⁸ We could explore how the courts could provide such a simplified mechanism here.

46. Alternatively we could learn from the United States and its experience with healthcare reform. In his recent account of the introduction of Obamacare, Steven Brill, notes how one way in which members of the public were helped to find their way through the insurance websites related to it was through the provision of digital navigators, individuals who could help the public ‘navigate’ the system.³⁹ We could, for instance, consider how we might be able to provide our own digital navigators, available over the phone or over a secure live web chat platform, who could assist litigants to issue claims and file documents etc. And for those who have no access to the internet of their own, we should provide access to terminals in court buildings and other public buildings throughout the country: access to justice should be local.

47. What about hearings and trials? They cannot but be held in the open as they are now. Open justice is the central means by which the courts are kept under scrutiny by the public. This is not to say that all hearings must be held in physically accessible courtrooms. There is no reason why certain hearings – preliminary or case management hearings should not be conducted virtually; if video or telephone conferencing or similar systems are available to converse across the world, there is no reason why, with suitable facilities for the public and for recording what happens, they should not be used as a mechanism for improving

³⁸ J. Dyson, *Delay too often defeats justice*, (The Law Society) (22 April 2015).

³⁹ S. Brill, *America's Bitter Pill*, (Random House) (2015).

efficiency and avoiding needless trips to court whether for lawyer or participant, particularly for those held on remand in custody.

48. As for trials, I am aware that the Supreme Court and the Court of Appeal allow cameras into court to record legal argument and judgment; I would not extend that facility to trials but to elaborate requires another lecture and I fear I have trespassed on your patience sufficiently. Suffice to say that I have little doubt that the presence of cameras would alter the dynamics of a trial and put undue pressure on witnesses many of whom will be reluctant participants in the court process. Examples of televising such trials, in my view, fully support that concern and risk converting through editing what is intended simply to be law in action into an action movie, inevitably providing a compressed picture of a complex process.

(6) Conclusion

49. Where do the various forms of constitutional reform leave us? They clearly show that we believe in the possibility of progress, that our constitution and the way in which we give life to it can be improved. No sanctimonious reverence here. Although long overdue, it shows that we have rightly accepted that the judiciary as an institution is one that must reflect society. This is not to lower standards, as some speciously suggest. It is to improve already high standards, to improve the high quality of our judiciary by ensuring that it is constituted of the most meritorious lawyers from across the whole spectrum of society. It is to ensure that the judiciary maintains its rightful legitimacy as part of the State, a State where all can and do play their part, in which all have a stake and can be seen to do so.

50. More than this though, it leaves us with a challenge: to communicate clearly that the judiciary is open to all with the necessary talent and ability, to ensure that we do not put false barriers in the way whether structural or otherwise. It also leaves us with a challenge to consider judicial structures: is the present structure the right one for today? Might it be improved, as it

has been in the past? If so, how and in which ways? Past reform points to consideration of future reform.

51. It equally shows that our changing judiciary is one that will, in the future, be placed at a more formal distance from political arena. Our senior judiciary is not, as in the past, able to speak on political matters in Parliament. Just as the Lord Chancellor is no longer able to don a judicial hat, we are no longer able to don political hats. We have more clearly defined fields of action. While we retain the right and duty to speak on matters relating to the administration of justice and judicial independence, we cannot range wider than that. We are judges and must exercise judgment.

52. And finally, constitutional principle lies behind the need to modernise our court structures and procedures. Our historic commitment to due process requires us to utilise digital technology, just as our courts have always evolved in the light of technological advances in the past. But equally, principle requires us to ensure that we do not blind ourselves with the possibilities of technology. Technology is no more than a tool to enable us better realise our commitment to due process, and as such due process must shape and limit the extent to which we can reform in the light of technology.

53. Taken together these three forms of reform will help to ensure that we have a judiciary and a court system fit for our constitution and the 21st Century.

54. Thank you.

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