



JUDICIARY OF
ENGLAND AND WALES

SIR BRIAN LEVESON
PRESIDENT OF THE QUEEN'S BENCH DIVISION

'SECURITY AND JUSTICE'

13TH ANNUAL ISAIAH BERLIN LECTURE
LONDON, 12 NOVEMBER 2015

(1) Introduction

1. It is a real honour to have been asked to give this year's Isaiah Berlin lecture. Sir Isaiah was one of the truly great thinkers of the 20th Century, and, quoting Trotsky's comment on the subject, a century which was not for those who desired a quiet life.¹ The same might well be said of present times. At the start of his famous essay on the *Two Concepts of Liberty* – before he started to define and discuss them – Sir Isaiah took issue with professional philosophers for failing, as he saw it, to give 'serious attention' to 'fundamental problems of politics'. Their failure to do so was 'both surprising and dangerous'. Surprising, because the twentieth century was one that had seen social and political ideas have profound and violent effects on the lives of very many. Dangerous because, as he put it,

*'when ideas are neglected by those who ought to attend to them – that is to say, those who have been trained to think critically about ideas – they sometimes acquire an unchecked momentum and an irresistible power over multitudes of men that may grow too violent to be effected by rational criticism.'*²

No doubt he would have been disappointed to see that those words remain as apposite now as they did at the time of writing.

2. Many people equate the concept of security with protection from terrorism and I am concerned that some of you may have attended this lecture on the basis that the subject is

¹ L. Trotsky, 'Anyone desiring a quiet life has done badly to be born in the twentieth century' cited in I. Berlin, *Political Ideas in the Twentieth Century*, in I. Berlin *Liberty* (H. Hardy ed) (Oxford) (2013) at 55.

² I. Berlin, *Two Concepts of Liberty* in I. Berlin *ibid* at 166 – 167.

highly topical given the threats to our community, our society and the world order generally. Add to that the recent Investigatory Powers Bill, there is much to discuss. Unfortunately, that Bill means that the subject is not one that I can discuss. As I have repeated many times in different contexts, particularly in relation to regulation of the press, being a serving judge, I cannot and do not comment on issues of political debate. They remain matters for professional philosophers, our representatives in Parliament and, of course, many others. Having said that, however, in this evening's lecture I want to consider a different aspect of the relationship between security and justice: like liberty and security, these are two ideas that are often posed in opposition to each other.

3. The context in which security is generally thought about is terrorism and the tension between security in that context and justice is evident in the problems that arise in litigation. In order to protect what the executive has defined as national security, the civil courts developed the concept of closed material proceedings in which one party to litigation is not provided with or able to challenge documents upon which his opponent, the State, relies but which are available to the judge. This is the data, collected covertly, which has caused concerns about our security. But how can it be challenged? The disadvantage faced by the litigant who is not shown the material, about whom the state has such concern but to whom it does not want to reveal what it knows or believes to be true, has been reduced but not removed by the appointment of a special advocate. That is a lawyer who, after seeing what has been disclosed but before seeing the secret material, has taken general instructions from that litigant as to what has been disclosed; he or she then sees the secret or closed material and can, to a certain extent, test it by reference to the general instructions received without being able to obtain specific instructions which would, of course, have revealed that which was to remain hidden. In 2011, however, the Supreme Court decided *Al-Rami v The Security Services*³ and concluded that such a process was one that the common law could not itself justify because it amounted to such a departure from the fundamental features of our approach that only legislation could achieve the change. Our principles of justice, according to the law, came first.
4. Parliament then took up the challenge and passed the Justice and Security Act 2013 which altered the balance and permitted such a procedure. Similarly, in criminal cases for the concepts of security and the need for protection of material has also passed those criminal

³ [2011] UKSC 34, [2012] 1 A.C. 531.

proceedings, as demonstrated by the decision in *Guardian News And Media Ltd & Ors v Incedal* (2014). This concerned the extent to which a prosecution for alleged terrorist offences could be held in private.⁴ The Court of Appeal decided that they could be, with the right of review by the courts after the conclusion of the trial: once again, I am afraid that I cannot comment on the issues surrounding the *Incedal* case: the post-trial review of the need for secrecy has recently been argued in the Court of Appeal and a decision is awaited.

5. The result of these developments is that I do not intend to consider the issue of closed material proceedings or security against terrorism tonight. What I want to do is to take a step back and look at fundamentals: as Sir Isaiah noted, these can be neglected to our detriment. It is important because such consideration may help to guide us as our justice system undergoes considerable reform.

(2) The first duty of government

6. My starting point then is constitutional principle. It has been said many times and is axiomatic, that the *'first duty of the Government is to afford protection to its citizens.'*⁵ But what is meant by the concept of protection?
7. Where to start? In English law we can trace our understanding of this constitutional principle to Sir Edward Coke CJ. On this occasion, possibly for the first time this year, it does not lead us into a detailed discussion of Magna Carta or his re-working of Magna Carta which so influenced the Americans and has affected our thinking about the rather grubby deal between King and Barons. Neither does it touch on his *Institutes of Laws of England*. Instead, it arises from his decision in *Calvin's case* or as it is also known the *Case of the Postnati*.
8. A question arose in the early part of the 17th century as to whether an individual by the name of Robert Calvin was able to hold land in England. The right to hold land at the time depending on whether you were an English subject, which is to say that you owed allegiance to the English king. Having been born in Scotland, Robert Calvin owed allegiance to the Scottish king and was thus a Scottish subject. The answer to the question would appear therefore to be a straightforward: no, he could not hold land in England.

⁴ [2014] EWCA Crim 1861.

⁵ Cited in S. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, [1991] Duke Law Journal Vol. 47 507, 508.

9. Perhaps ever the way with the law, the position was not, however, so clear-cut. The reason was that England and Scotland had the same king: James I of England was King James VI of Scotland. Young Robert had been born after James' accession to the English throne. In the light of this, could he be viewed as owing allegiance to James as both King of England and of Scotland? If he could, he could then lawfully hold land in England as well as in Scotland. Given the extent of estates Robert stood to inherit in England this was, for him, more than academic. The court answered the question in his favour: having been born after the Union of Crowns, his allegiance to James meant he was, as far as the English common law was concerned, as much an English as he was a Scottish subject. He could thus enter into his inheritance.

10. In the course of his judgment Coke CJ gave what has been described as the '*classic expression*'⁶ of the government's first duty. He explained it in this way,

*'Now let us say what the law saith in time of peace, concerning the King's protection and power of command, as well without the realm, as within, that his subjects in all places shall be protected from violence and that justice may equally be administered to all his subjects.'*⁷

It was the King's duty to '*maintain and defend*'⁸ his subjects, who in turn owed a duty of loyalty to the King. We can readily see that this duty was and continues to be fulfilled through the provision of national defence even in times of war. No doubt this also applied in respect of what the law said in times of war⁹ and, as Sir Robert Peel would have acknowledged explicitly while establishing the Metropolitan Police, through the provision of an effective police force¹⁰. It is equally fulfilled by the provision of just laws together with the means to enforce them and the rights to which they give expression.¹¹

11. What was then the King's duty can be understood today as the duty of the State, with Parliament, Government, and the Judiciary each having its respective role to play: the former two through enacting just law, providing the funds for the armed forces, the police, the justice system along with implementing the law; the third, by clarifying, developing and upholding the

⁶ S. Heyman, *ibid* at 513.

⁷ *Calvin's Case* (1572–1616) 7 Co.Rep. 1a, 77 E.R. 377 Eng. Rep. at 386.

⁸ *Ibid* at 382.

⁹ *Liversidge v Anderson* [1942] AC 206 at 244. Contrary to Cicero's view, the law is never silent: cf M.T. Cicero, *Pro Milone in Defence Speeches*, (Oxford) (2008) at 169.

¹⁰ S. Heyman, *ibid* at 544.

¹¹ S. Heyman, *ibid* at 513.

law and, through that, the rule of law. It is perhaps for that reason that lawyers and judges sometimes refer, perhaps somewhat pompously, to the judiciary as the third arm of the state.

12. This is straightforward. That the duty requires both the protection from violence as well as the equal and measured administration of justice points to a fallacy in the idea that security and justice are principles that necessarily stand in opposition to each other. It suggests that at a basic level the provision of security and justice are one and the same; that any supposed clash between them is, as was the clash for Karl Popper between freedom and security, '*a chimera*'.¹²
13. Why? It could be said to be a chimera because, to fulfil its first duty, the State must provide both security and justice. While it can provide the former through its armed forces and police force, such provision is a necessary but not a sufficient means to fulfil that duty. It is necessary because, without security, it is difficult to see how there can be an effective State, through which justice can be done. It is not sufficient because, as history has too often shown, without an effective justice system, security can become another name for oppression and arbitrary conduct, leading to the violation of physical or legal integrity and, thus, security. Again, it is not sufficient because an effective justice system is needed to secure its citizens from physical harm through rendering the deterrent effect of the criminal justice system real rather than notional, just as it is needed both to ensure that the innocent are not wrongly convicted and to enable the vindication of private and public civil rights.
14. Neither is its significance limited to deterrence. In 1916, the Spanish jurist Montero emphasised that one of the aims of the criminal justice system, or more particularly, the penal system, was to protect offenders and suspected offenders from unofficial retaliation because that will lead to further disorder and the dominance of the powerful. We only need to look at the recent violence in Manchester with tit for tat violence following the murder by shooting of Paul Massey and many other examples of inter-gang violence. Unless controlled, there is a risk to society of the breakdown of civil order. Our society should simply not have no-go areas.
15. Looked at another way, we need the police and, ultimately, the armed forces to secure the physical integrity of citizens and, in certain circumstances, the State itself. However, the

¹² Popper, *The Open Society and its Enemies*, (1945) Vol. 1 at 111, '[T]he alleged clash between freedom and security, that is, a security guaranteed by the state, turns out to be a chimera. For there is no freedom if it is not secured by the state; and conversely, only a state which is controlled by free citizens can offer them any reasonable security at all.'

effective administration of justice, of which the police also form a part, secures both the physical and legal integrity of the State. As Lord Shaw noted in *Scott v Scott*, violations of principles underpinning the administration of justice – in that case the constitutional due process principle of open justice – amounted to ‘*an attack upon the very foundations of public and private security*.’¹³ Justice rests on security; without justice there is no security.

16. We are, however, undergoing a period of austerity when the microscope is applied to all public expenditure. There have been significant reductions in many areas including to the justice system and I recognise that there are many political judgments to make as a result. Given the reductions, the question that Sir Isaiah Berlin might have suggested we ask could be: how are we to ensure that we continue to secure that first duty of government, the effective administration of justice? Unless we do, our ability to provide effective security – both physical and legal – will become increasingly compromised. How do we maintain justice and security? It is to that I now turn.

(3) Due process and the effective administration of justice

17. My starting point here is procedural due process, procedural justice or fairness, depending on which term you prefer. This, as we all know, refers to the basic, long-established principles that underpin and guide the operation of our justice system. Taken together they render it and its processes ‘*fair and right and just*’.¹⁴ To name but some of these principles, they are the right to an independent and impartial tribunal; the right to effective access to justice, which would encompass, amongst other things, to receive privileged legal advice; to due notice of the proceedings and their content; to a fair hearing, at which 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.¹⁵
18. Historically, we would also have said without a moment’s hesitation that the right to receive a reasoned judgment arrived at on the substantive merits of the claim is part of what we mean when talking about due process. As the American scholar Rosenberg put it, albeit referring to the justice system in the United States, the ‘*desirability of deciding cases on their merits*

¹³ *Scott v Scott* [1913] A.C. 417, 476.

¹⁴ *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.*’

¹⁵ For a useful summary see, H. Friendly, *Some Kind of Hearing*, Univ. Penn. Law Rev. [1975] Vol. 123, 1267.

...’ is a basic, traditional, procedural principle.¹⁶ His point, however, is equally valid here. Since the 1870s it has been the central premise upon which our civil justice system has operated. It is equally applicable to our criminal and family justice systems. It is difficult to envisage a system that properly seeks to acquit the innocent and convict the guilty that is not predicated upon deciding cases on their merits.

19. Taking that issue to a slightly deeper level, it is important to understand what deciding the case on its merits truly means. In times gone by, it was reaching a decision following a trial which was entirely directed by the parties. They took as long as they wanted and, invariably, ground exceeding fine every detail and issue in the case. Since reforms introduced by Lord Woolf and the new Civil Procedure Rules, followed by the development of the Criminal Procedure Rules in relation to criminal justice, it has become a cardinal principle or overriding objective across the system, that the courts should seek to ensure that cases are dealt with justly which includes dealing with it efficiently, effectively and fairly.
20. In civil cases, this includes allocating an appropriate share of the court’s resources while taking into account the need to allot resources to other cases. In criminal cases the concept is described in slightly different language: dealing with the case in ways that take into account, the gravity of the offence, its complexity, the severity of the consequences but also the needs of other cases. Case management and control of litigation is now behind a great deal of what judges do. This is not and should not be taken to be suggesting a lesser interest in proper and reasoned decisions on the merits. It is a recognition of the need for all to focus on the most important features of any case bearing in mind that the resources of the court are limited and there are many other cases that also require a timeous hearing and decision.
21. That is not to say that the role of the justice system should be seen principally and primarily as providing a forum for settlement. In the Interim Woolf Report, Lord Woolf endorsed the position set out in a previous reform report prepared by Hilary Heilbron and Henry Hodge, that *‘the philosophy of litigation should be primarily to encourage early settlement of disputes.’*¹⁷ Although I am sure that this is not what was intended, to place too much emphasis on this purpose of the justice system is to risk undermining the first duty of government. Let me explain.

¹⁶ M. Rosenberg, *Devising Procedures that are civil to promote justice that is civilized*, [1971] Michigan Law Review 797, 803.

¹⁷ H. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) at 5; H. Heilbron & H. Hodge, *Civil Justice on Trial – A Case for Change* (1993) at 6.

22. The justice system as a whole operates on two levels: the individual or adjudicatory and the societal or, as Steele once described it, the ‘*symbolic*’¹⁸. The first is concerned with the resolution of individual disputes: it provides a mechanism for citizens, whether individual or corporate, to secure an answer to a disagreement as to the effect or impact of what has happened in the past. Who was responsible for the road traffic accident? Was there a breach of contract? Was the government entitled to deport this asylum seeker? How should the assets of a divorced couple be split? This is equally true of the criminal justice system, which deals with allegations generally made by the state of breaches of minimum standards of behaviour, which we have characterised as criminal. Is this defendant guilty of murder? Was that driving dangerous?
23. Now I accept that resolution of disputes can come in a number of ways and it is important to recognise that resolution by the courts through judgment on the merits is very much the exception rather than the rule. It is a truism that the vast majority of disputes do not reach the courts, and that of the small percentage that do, an even smaller number – which is to say, for instance, 3% of civil claims¹⁹, are determined at trial. Similarly, most criminal cases end in a plea of guilty, rather than a trial either at Magistrates Courts or Crown Courts. The road to judgment is paved with settlement and compromise. This is not the specific aim of the justice system but an essential by-product on the basis that if every claim went to trial, the systems of criminal, family and civil justice would fail.
24. That brings me to the second societal or symbolic level at which the justice system operates. This is creating ‘*order through the articulation of norms of general application...*’²⁰. In addition to providing the answer to the litigants in their dispute, decisions of the court give clear, authoritative, statements of the law. They develop and refine the law, through the example of concrete cases. So, as society evolves, it ensures that the law too evolves through the medium of the common law. This is all subject to Parliament’s legislative responsibility and its ability to reverse the effect of any decision of the courts or create a new direction for the law: the receipt of closed material to which I referred at the start of this lecture is but one example.

¹⁸ E. Steele, *Morality, Legality, and Dispute Processing: Auerbach’s Justice without law*, (1984) American Bar Foundation Research Journal 189, 201.

¹⁹ See, for instance, HMCTS, *Civil Justice Statistics Quarterly, England and Wales (Incorporating Privacy Injunction Statistics January to June 2015)* at 10 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457979/civil-justice-statistics-april-june-2015.pdf>.

²⁰ E. Steel, *ibid*.

But going back to decisions of the courts, the critical function at this higher level is to identify societal and legal norms, thereby guiding behaviour and helping to secure the basic framework within which society operates.

25. Looked at in this way, it cannot simply be the case that the primary philosophy of litigation should be settlement. If it were, it could serve to undermine this societal level at which the justice system operates. If, for instance, the primary philosophy of the criminal justice system – which it isn't – was to avoid prosecutions whether by out of court disposals or other diversion, it is difficult to see how long we could maintain any sense that it had a role in affirming legal and behavioural norms. Over time, such failure to provide a public mechanism to address criminal offending will tend to undermine its ability to deter further criminality, or to reinforce the legal and physical security the State seeks to provide for its citizens through the criminal law.
26. The same is true of the civil justice system. If its primary aim was to divert disputes from the court room and formal adjudication, it is equally difficult to see how civil judgments could continue to secure the necessary framework within which individuals and society as a whole could order the lives, conduct business, interact with central and local government and do so lawfully. Reducing the number of judgments would reduce the possibility that they would be able to clarify and develop the law. The public benefit of civil judgment would thus over time winnow away until it was lost.
27. Equally, it would ultimately be self-defeating. Settlement and judgment have a symbiotic relationship, with the former resting upon the existence and availability of the latter. Without the framework that the law provides, settlement becomes more difficult to achieve. Clarity in the law and properly articulated legal norms, enable parties to be advised and to appreciate the strengths and weaknesses of their respective positions. Uncertainty, or a lack of legal clarity, makes that all the more difficult. It thus tends to undermine the achievement of settlement. Clarity is thus capable of promoting settlement, its absence through a reduction in court judgments, of undermining it.²¹ The price of promoting settlement as the court's primary aim may then become the very framework that facilitates it. Incidentally, the absence of lawyers also undermines settlement as litigants in person do not know the law and are not in a position

²¹ R. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: the case of divorce*, 88 Yale L.J. 950 1978.

to identify what facts and arguments are likely to assist them or what weaknesses their cases reveal.

28. This raises a further concern. By weakening the framework of law that supports sensible advice and settlement, there is a risk that such settlements that there are may be less just. By that I mean to suggest that they are less likely to reflect a proper appreciation of the merits by the parties of their respective positions. As a consequence, they are less likely to reach an agreement that both are content to live with. As has been argued by Mnookin and Kornhauser, a weaker framework promotes settlement on the basis of the parties' relative approach to risk and their relative financial resources. The less risk averse and less wealthy are thus more likely to accept a settlement they are unhappy with, rather than facing court proceedings. And the less happy with a settlement a party is, the less likely they are to comply with it or the more likely that further difficulties will ensue.
29. Undermining settlement through its promotion as the primary aim of the civil courts, either through reducing clarity in the law or through weakening the prospect that it may be just, would seem to point to either of two consequences. First, it could increase the number of disputes that are litigated to trial. This would hardly be consonant with Lord Woolf's original aim. From a practical perspective, it would likely pose a problem for the courts in terms of managing any such increase within the ambit of resources currently available. Secondly, it would be inconsistent with the first duty of government. Weakening the legal framework provided by the courts undermines the law's normative force. It undermines law's ability to provide security. As does undermining the prospect of just settlement of disputes. The fewer disputes that are settled the more rancorous society is likely to become. And undermining the courts' ability to determine cases via trial and judgment by potentially diverting more and more claims, which would otherwise have settled, to the court undermines justice, and thereby legal security.
30. This is not to suggest that I am a sceptic of settlements. Nor is it to suggest that I believe the courts should not seek to promote settlements. They can and should continue to do so. It is, as Sir Isaiah would have counselled, to suggest that we need to reconsider our approach to judgment and settlement. It is to do so by starting from what is the real primary aim of the courts and justice system: the promotion of justice and security. It is to that which I now turn.

(4) Securing the first duty of government

31. If, as a society, we are to ensure that the courts can play their proper role in discharging the first duty of government, it is essential that we secure an effective and efficient justice system, that is to say, one that is fit for the 21st Century. There are two approaches we could take: piecemeal reform or properly considered holistic reform. We have historically taken both approaches. In the 19th Century, we tried piecemeal reform of our courts and the legal profession to improve the functioning of the justice system. When that approach did not yield positive results, we opted for detailed, holistic reform of the courts and created the High Court and Court of Appeal. In the 20th Century, we reverted to piecemeal reform, whether that was through reform of divisions of the High Court Divisions or the abolition of Assizes and Quarter Sessions and the creation of the Crown Court.
32. So far, the 21st Century has also seen a piecemeal approach, with discrete reforms to the regulation of the legal profession, alteration to the provision of legal aid, reform of the structure of the courts, tribunals and judiciary as well as varying degrees procedural reform in the civil, family and criminal courts. We stand on the threshold of substantial reform of our criminal and civil courts. Lord Justice Briggs is conducting an urgent review of the structure of our civil courts, and their relationship with the Family Court and Tribunals. It encompasses consideration of the creation of an online court and the delegation of judicial functions to what are referred to as ‘delegated judicial officers’.²² I have recently considered and made recommendations for the reform to the criminal courts.²³ And sitting alongside the procedural court reforms, the government is considering whether legislative action is needed. Finally, there is the ongoing work on reform of Her Majesty’s Courts and Tribunal Service, which is looking to modernise the operation and administration of the courts and tribunals.
33. Underpinning much of the work that is going on is the march of information technology, the internet and the possibilities that digitisation brings with it. As such, the various reform strands must be considered together. They may focus on different aspects of the justice system, but they are necessarily interconnected. Proposals in one area will inevitably have a real, or the potential for, impact on others. The introduction of digital case files in criminal proceedings obviously has an impact on the possibility and nature of similar innovation in civil and family

²² See Civil Court Structure Review < <http://www.chba.org.uk/news/civil-court-structure-review>>; and Terms of Reference <<https://www.judiciary.gov.uk/wp-content/uploads/2015/07/briggs-review-terms-of-reference.pdf>>.

²³ B. Leveson, *Review of Efficiency in Criminal Proceedings*, (Judicial Office) (January 2015).

proceedings. The development of further delegation of judicial functions, of which there is a long if not fully appreciated tradition here (as well as in other common law jurisdictions) through the use of High Court Officers at one level to justice's clerks and deputy Masters in the Court of Appeal (Civil Division) at other levels, will necessarily engage all aspects of the justice system. It will have an impact on criminal, civil and family justice. And the development of an online court and online, virtual, hearings is something that engages the due process principles I referred to earlier and will no doubt do so differently in different jurisdictions. These are all matters that cannot be considered in isolation of each other.

34. We therefore have to consider holistic rather than piecemeal reform. It is something that the Lord Chief Justice and the Judicial Executive Board are considering in detail. They are doing so in order to ensure that the courts and judiciary are capable of discharging the first duty. None of this, however, can properly be achieved without two things being in place. The first and most obvious is the financial resources to effect reform properly. If the justice system is to deliver, in terms of reform and the improvements that will bring, it must be provided with the means to do so: in other words, the investment must follow. That, of course, is a question for government; it is a duty that Parliament has placed upon the Lord Chancellor whose oath of office requires him to ensure the provision of resources for the efficient and effective support of the courts for which he is responsible.²⁴

35. There are, of course, many financial pressures on government. It is sometimes suggested that the provision of funds for the justice system, when compared to the need to provide such funds for health, welfare or education, is less pressing or less justifiable. There is undoubtedly considerable force in the demands made by these departments on the public purse. Many features of our civil society, however, depend on the existence of a prosperous, peaceful and secure society, in which legal norms established by and through the justice system play an ineluctable part. Investment in the justice system is an investment in the architecture underpinning the various services that the State provides. It is not itself necessarily investment in a service, although the system does, in fact, provide a critical service.

36. Secondly, the assessment of the proposed reforms, and their development, must be carried out on a principled basis. We cannot, for instance, pursue efficiency and economy for their own

²⁴ s. 1 Courts Act 2003 and s. 17 Constitutional Reform Act 2005.

sake. We cannot digitise simply because it is the modern thing to do, or broadcast the courts over the internet because we have the means to do so. We need to consider how and to what extent reform is consistent with principle. If we do not, we risk raising similar problems to those which arise by simply saying that the primary philosophy of civil procedure should be settlement. Principle must shape practice. How might it do so?

37. We must, of course, recognise that the primary philosophy underpinning litigation, whether in the civil, criminal or family courts, is to secure the rule of law. That is the means by which the courts deliver justice and security. In addition, we must then recognise that the courts achieve this by operating on the two levels I referred to earlier: the symbolic and the individual. This has consequences. It means that the courts must operate so as to ensure that the judgments promulgated in cases that go to final determination by a court are such that enable the law to be clear and consistent with the needs of the 21st Century, and also ensure that the law can retain its normative, behaviour-shaping quality. In this way, family and civil courts are able to promote sensible settlement in individual cases before the case reaches the door of the court and that, in criminal cases, the climate is conducive to appropriate clear advice so that those cases which end up with a plea of guilty or some other resolution do so in good time and without undue waste of precious resources. It is critical that the balance between the two, trial and earlier settlement, is maintained.
38. One way in which we can strike this balance properly – and ensure that the primary aim of procedure at the individual level is resolution other than by trial, without undermining the primary aim of securing the rule of law was suggested by Lord Justice Briggs in his recent Chancery Modernisation Review.²⁵ It was also suggested in the Report by *Justice*, entitled *Justice in an Age of Austerity*,²⁶ and underpins work carried out by Professor Susskind and the Civil Justice Council on the development of an online court and dispute resolution mechanism²⁷. It is to develop an IT dependant system through which the courts can manage disputes so that they are resolved appropriately. This is not a new idea, it was one developed by Professor Sander of Harvard University in the early 1970s.²⁸ History often takes its time in catching up with a good idea.

²⁵ M. Briggs, *Chancery Modernisation Review*, (Judiciary of England and Wales (2013).

²⁶ Justice, *Justice in an Age of Austerity* (2015)

²⁷ Civil Justice Council, *Online Dispute Resolution*, (February 2015).

²⁸ F. Sander, *The Varieties of Dispute Resolution*, (1976) Federal Rules Decisions (77) 111.

39. In the civil and family courts this would entail a change in approach. Rather than case management focusing on smoothing the road to judgment, it would focus initially on identifying with the parties an appropriate method through which their dispute could be resolved. A screening process would take place. Upon issue a court officer, one with delegated judicial powers for instance, and most likely via an online mechanism, would help the parties to identify the real issues underpinning the claim. They would identify the best means to resolve the dispute. This might mean referral to mediation, arbitration, or conciliation. It might be reference to early neutral evaluation carried out either by a lawyer, perhaps an expert, or perhaps a judge. It might equally mean immediate transfer to an adjudication track with formal case management or to a fast track procedure such as that provided by the recently introduced shorter and flexible trial procedure in the Commercial Court and Chancery Division.
40. In this way settlement could be properly promoted in individual cases. Equally, the screening process could properly ensure that disputes that raised novel points of law, that had wider importance than to the immediate parties, could reach trial and judgment at proportionate cost and in reasonable time, subject of course to the parties not wishing to reach a settlement. Finally, it could ensure that sufficient numbers of claims reached trial and judgment, which when combined with the continued growth of precedent, maintained the normative effect of the legal framework, thereby promoting settlement outside the judicial process.
41. In the criminal justice system, it means judge led case management and proper identification of the issues so that trials can be conducted more efficiently and effectively. It means ensuring that the parties and their lawyers only come to court when it is necessary with directions provided after e mail exchanges or online conferencing. It means looking again at ways of preventing reoffending such as the use of problem-solving courts²⁹. They are a well-known feature of, for instance, the US justice system – particularly New York – and have been for some time. We have experimented in this area here in the recent past, for instance, through the North Liverpool Community Justice Centre and at Magistrates Courts in Salford and other places. Just as with civil and family justice we should be looking at ways in which the criminal courts and criminal justice system as a whole can work better to provide justice and security. Greater deterrence and improved rates of preventing recidivism through what might be considered non-traditional methods may well lead to a more civil and civilised society, while

²⁹ See, for instance, R. Wolf, *Principles of Problem-solving Justice*, <<http://www.courtinnovation.org/sites/default/files/Principles.pdf>>.

retaining a proper role for the punitive aspects of the criminal process.

(5) Conclusion

42. Across the justice system, the demand we must address is how we can properly provide individual justice as well as systemic justice. We will only do so if we hold firmly to the first duty of government enunciated by Sir Edward Coke – that is to say, the protection of citizens.

43. Taking that view may require us to recast our justice system. That is not something that we should shy away from. Improvements can always be made, and should be made where they are calculated to and do produce better outcomes for individuals and for society. In formulating and implementing reform, however, we must ensure that we do not, as a consequence of imprecision about our aims and objectives, act in ways that can or do undermine our duty and its achievement.

44. Information Technology is likely to provide the means by which we can do so. It however is a means to an end. Its use, as with all other aspects of any propose reforms, can only be justified in so far as it is a means of achieving the proper ends of justice. Principle must shape any new practice. It must because, as Isaiah Berlin might have warned, if we neglect fundamental issues the results may be both surprising and dangerous. Where the proper functioning of the justice system is concerned, if we wish to maintain security and, critically, security through justice, we can ill afford results of that kind.

45. Thank you.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.
