



COURTS AND  
TRIBUNALS JUDICIARY

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**SECURING OPEN JUSTICE**

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**(1) Introduction<sup>1</sup>**

1. It is a real pleasure to have been invited to give the keynote address today. Open justice is central to our justice systems. It is more than that. It is, through our courts and justice systems, of fundamental importance to democratic government. If I can borrow from Woodrow Wilson, our courts are the *'balance-wheel'* of our constitutions. They are *'the ultimate safeguard alike of individual privilege and of governmental prerogative.'* They maintain *'political liberty'*, and the rule of law.<sup>2</sup> Without effective open justice they would not be able to be so.
2. This might seem, at first glance, rather a bold claim for what many may take to be no more than the principle of publicity common to our justice systems and

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

<sup>2</sup> W. Wilson, *Constitutional Government in the United States*, cited in H. P. Lee & E. Campbell, *The Australian Judiciary* (2<sup>nd</sup> ed, CUP, 2013) at 1.

articulated in article 6 of the European Convention on Human Rights. It is not a bold claim. And nor is open justice simply another way of referring to the principle of publicity. On the contrary, I take it to encompass three related principles; related because they depend upon each other for their general efficacy.

3. First, I take open justice to encompass the principle of equal access to court. The commitment, a common law constitutional right in the United Kingdom, of access to justice.<sup>3</sup> Unless courts are genuinely open to all those, whether individuals, businesses, state entities, governments local and central, who need to vindicate their rights, we weaken at best and fail at worst to make good our commitment to democratic government. In the UK this point has recently and forcefully been expressed by the Supreme Court. In the case of *R (UNISON) v Lord Chancellor*, Lord Reed explained – not that it should need explanation – how without ‘*unimpeded access*’ to the courts, ‘*laws are liable to become a dead letter*’. In turn, as he put it, that renders ‘*the work done by Parliament . . . nugatory, and the democratic election of Members of Parliament . . . a meaningless charade.*’<sup>4</sup>
  
4. For democracy to be meaningful the courts – justice – must be open to all. To emphasise this in the clearest terms in our highest courts, as Lord Reed did, is a starting point. To ensure it is a reality is entirely another thing. We need only recall the pioneering work of Cappelletti and Garth to know that<sup>5</sup>. It is, unfortunately, a continuing truism that for large numbers of individuals and businesses the doors of our courts and tribunals remain closed; the right of access theoretical. To the extent that they are, we can say, following Lord Reed, that there is a democratic

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<sup>3</sup> *Attorney-General v Times Newspapers Ltd* [1974] AC 273; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 at 979.

<sup>4</sup> [2017] UKSC 51, [2017] 3 WLR 409 at [68].

<sup>5</sup> See, for instance, M. Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, *The Modern Law Review*, (1993) (Vol.56) 282.

deficit. We are taking steps to remedy this problem in the UK through bold, systemic reform and digitisation of our court and tribunal processes, and I wish to return to that later. It is, however, particularly important that we do so for another reason.

5. In their recent book on the continuing and possible future development of online dispute resolution, *Digital Justice*, Ethan Katsh and Orna Rabinovich-Einy<sup>6</sup>, outline the sheer number of disputes that are being resolved online by private dispute resolution services, such as those used by eBay and Amazon. The numbers are staggering: eBay, for instance, resolves 60 million disputes per year.<sup>7</sup> These systems are effective. They produce settlements that the parties are happy with, and they provide procedures which are intuitive ie both intelligible and comprehensible to the user. There are serious arguments underpinning their work that our justice systems could not properly deal with the number of disputes these digital systems deal with nor provide an equivalent user experience. At the moment, those arguments are likely to be correct. There is also a persuasive argument that, from a public policy perspective, we should not encourage all such disputes to come before the courts. Peaceful, mutually agreed settlement is in the public interest as much as resolution via court determination and judgment.
  
6. It is one thing, however, to accept that there is a public interest in the promotion of settlement. It is, however, quite another to accept that such disputes are not, or could not be made, capable of being brought before the courts. To accept the second proposition is to accept that we are moving towards a society where there are *digital*

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<sup>6</sup> OUP, 2017.

<sup>7</sup> E. Katsh & O. Rabinovich-Einy, *Digital Justice*, (OUP, 2017) at 4.

*outlaws*; individuals and businesses whose disputes are outside the law's protection and control. We would, thereby improperly accept, that dispute resolution should be outsourced by the State to algorithms designed to the specifications of private actors. We would be acquiescing in the privatisation of justice; or to borrow from Owen Fiss, it would be '*capitulation to the conditions of [digital] society*'<sup>8</sup>.

7. If we are properly committed to open justice in the first sense I have outlined, we cannot accept that this is, or should be, the case. On the contrary, if we are – as Lord Browne-Wilkinson once put it – to ensure that courts and tribunals meet society's current demands for justice we cannot but configure them so that such claims are capable of being tried and adjudicated effectively.<sup>9</sup> If we do not, as he went on to rightly conclude, we undermine both judicial independence and the rule of law. This places a significant onus on the judiciary as an institution of State to act<sup>10</sup>.
8. Open justice's second aspect is the one with which we are all immediately familiar. It is that courts and their judgments must be open to scrutiny by the public, and the media. Followers of Bentham will know why. It is that publicity – openness – is the great antiseptic. That it is, as Bentham had it, '*the very soul of justice. The keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge . . . , while trying, under trial*'.<sup>11</sup> A judge observed while judging is an attentive judge. A judge observed is, as Lord Neuberger MR observed in the case of *Al-Rawi*, a democratically accountable judge<sup>12</sup>. When justice slips out of sight, this is lost and

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<sup>8</sup> O. Fiss, *Against Settlement*, (1984) 93 Yale LJ 1073 at 1075.

<sup>9</sup> Lord Browne-Wilkinson, *The Independence of the Judiciary in the 1980s*, P.L 1988, 44

<sup>10</sup> *Ibid* at 45.

<sup>11</sup> J. Bentham, *Draught for the Organization of Judicial Establishment*, in *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh) Vol. 4 at 316.

<sup>12</sup> *Al-Rawi v Security Services* [2010] EWCA 482, [2012] 1 AC 531 at 543

the prospect of arbitrary, incompetent or unlawful conduct raises its head. Again, if we simply accept the argument that private online dispute resolution is the way in which the majority of disputes, and in some areas all disputes, may be resolved in future we accept this loss of accountability; we further accept the growth of a democratic deficit. And the same is the case if we divert public justice to an unobservable online forum. Our digital courts must be open courts.

9. Open justice's third aspect again is one we are all familiar with. Open justice, through accessibly-written public judgments, are the means through the courts fulfil their role of, again if I can borrow from Owen Fiss, explicating and giving '*force to the values embodied in authoritative texts such as [our] Constitutions and statutes*'<sup>13</sup>. They interpret, communicate and develop our public social values. Finally, and again as most recently emphasised in the UK by Lord Reed, judgments help to provide clarity and certainty in terms of our legal framework; the framework without which the social and economic development of society would not be able to take place effectively.<sup>14</sup>

10. Open judgments create the shadow of the law within which we order our lives. And again, linking back to both the first and second aspects of open justice, access to the courts and public scrutiny provide for the judicial process to be carried out properly and ensure that that framework can be properly challenged, articulated, and developed both through the legal process and through stimulating public,

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<sup>13</sup> O. Fiss, *ibid* at 1085.

<sup>14</sup> [2017] UKSC 51, [2017] 3 WLR 409 at '*Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless.*'

democratic debate. The importance of this latter aspect, a concept I shall call ‘observational justice’, should not be underestimated in the face of the tendency otherwise to irrational populism or at least populist propositions that are incapable of empirical validation.

11. Against this background, I want to focus on the question of what steps the judiciary should take to secure open justice. In doing so I want to look particularly on

- The judiciary’s duty to secure open justice; and
- How that duty should be implemented.

I should stress at the outset that my comments today, except where clear from the context, are focused on the structure, leadership and management of the UK Tribunals system, of which I am the current Senior President.

## **(2) The judiciary’s duty to secure open justice**

12. The judiciary has a clear, constitutional duty to secure open justice. This is not a matter of debate. It was recognised as such by the House of Lords in its seminal decision in *Scott v Scott* [1913] AC 417. It is inherent in the duty placed on courts by section 6 of the Human Rights Act 1998 not to act in ways incompatible with article 6 of the Convention. It is inherent in the long-established common law constitutional principle of the rule of law, which in the UK has been explicitly recognised in statute since 2005.<sup>15</sup> It was affirmed by the Supreme Court in *Al-Rawi*, when the court held that the courts could not in developing the common law

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<sup>15</sup> Constitutional Reform Act 2005, s.1.

do so in a way that permitted the creation of secret hearings, ones which admitted of no public participation or accountability and contravened fundamental aspects of party participation in proceedings.<sup>16</sup>

13. These and other such decisions, of which there are many, affirming the constitutional right of access to justice are however focused on what the judiciary is required to do in exercising its judicial functions. It might be said that they do not provide a *basis* for the judiciary taking active steps to secure this constitutional right outside the court room. The judiciary's duty is not limited in this way. As Lord Diplock put it,

*“ . . . in any civilised society, it is a function of government to maintain Courts of Law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the State as representing society as a whole. The provision of such a system for the administration of justice by Courts of Law and the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another.”*<sup>17</sup>

Different countries can take different approaches to how their government carries out this duty. The way in which our constitutional settlement now operates, and has done since the Constitutional Reform Act 2005 and the Concordat between the Lord Chancellor and Lord Chief Justice<sup>18</sup> which both preceded it and was implemented by it, is one of active partnership between the executive and judiciary in running the courts.

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<sup>16</sup> *Al-Rawi v Security Services* [2010] EWCA 482, [2012] 1 AC 531.

<sup>17</sup> *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 307.

<sup>18</sup> Department of Constitutional Affairs, *Constitutional Reform - The Lord Chancellor's judiciary-related functions: Proposals* (January 2004); Also see the Concordat between the Ministry of Justice and the UK Supreme Court <<https://www.supremecourt.uk/docs/concordat-with-ministry-of-justice-150113.pdf>>

14. As Professor Maleson rightly noted in evidence to the House of Lord Constitution Select Committee in 2007, the post-2005 settlement was one that envisaged ‘*two separate but equal branches working together to manage the courts and judiciary*’.<sup>19</sup> As Lord Thomas, then Lord Chief Justice put it last year, the relationship between the branches of the State is one of interdependence.<sup>20</sup> This interdependence – working together – is manifested in a number of ways, each of which emphasises the active role the judiciary must play in securing the proper administration of justice, of open justice. Let me outline the specific aspects of this duty and the manner in which it is carried out in partnership with the other branches of the State.

15. First, as a matter of the common law it is the judiciary that exercises the court’s inherent jurisdiction to govern the court’s processes. This was the historic power to issue Practice Directions governing the courts procedure and practice. It was, and remains, additional albeit subordinate to, any rules of court approved by Parliament. Today, it is a power that is usually only exercised by the senior judiciary in partnership with the executive, although its basis remains the court’s common law jurisdiction.<sup>21</sup> This jurisdiction permits the senior judiciary to prescribe both rules, in the broad sense, governing practice in the courts, but equally enables it to make provision for the effective administration of the courts.<sup>22</sup>

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<sup>19</sup> Professor K. Maleson, *The Effect of the Constitutional Reform Act 2005 on the relationship between the Judiciary, the Executive and Parliament*, in House of Lords Constitution Committee, *Relations between the executive, the judiciary and Parliament*, (6<sup>th</sup> Report of 2007), Appendix 3 at 63 <<https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>>.

<sup>20</sup> Lord Thomas CJ, *The Judiciary within the State – The relationship between the branches of the State*, (15 June 2017, Michael Ryle Lecture) at [18]ff <<https://www.judiciary.gov.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf>>

<sup>21</sup> *Bovale v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] 1 WLR 2774.

<sup>22</sup> *Attorney-General of the Gambia v Pierre Sarr N'Jie* [1961] AC 617 at 630. A recent example would be Lord Phillips CJ’s Practice Direction effecting a change to judicial court dress: Practice Direction Court Dress (No 5) of 2008 <[https://www.barcouncil.org.uk/media/61240/1508\\_court\\_dress\\_pract\\_dir.pdf](https://www.barcouncil.org.uk/media/61240/1508_court_dress_pract_dir.pdf)>.



16. Second, the judiciary in partnership with the executive and Parliament is responsible for the administration of the courts and tribunals. This is carried out in England and Wales by way of an express partnership between the Lord Chancellor, for the executive, and the Lord Chief Justice for the courts and Senior President of Tribunals for the Tribunals.<sup>23</sup> The Lord Chancellor is under the specific statutory duty to provide sufficient court and tribunal buildings and staff and secure, from Parliament, sufficient funds to secure the proper administration of justice.<sup>24</sup> The Lord Chief Justice and Senior President are under statutory duties requiring them to secure the effective deployment of the judiciary, to provide effective training, guidance and welfare provision for the judiciary, and to represent their views to the executive and Parliament.<sup>25</sup> In Scotland, there is no Lord Chancellor and the partnership in respect of tribunals is between the Senior President and the Parliaments. The constitutional partnership in England and Wales is carried into effect by Her Majesty's Courts and Tribunals Service; the body which provides and runs the courts and tribunals on a day-to-day basis.<sup>26</sup>

17. Additionally, the Senior President has a number of specific duties, which require me to ensure that while I carry out my duties I have regard to the need to ensure that: tribunals are accessible i.e., open, their judges are expert, that proceedings are

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<sup>23</sup> HMCTS Framework Agreement (CM 882, July 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384922/hmcts-framework-document-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf)>.

<sup>24</sup> Courts Act 2003, ss.1 – 3; Tribunals, Courts and Enforcement Act 2007, ss.39 – 41.

<sup>25</sup> Constitutional Reform Act 2005, ss.5, 7; Crime and Courts Act 2013, s. 21; Tribunals, Courts and Enforcement Act 2007, sch. 1, part 4.

<sup>26</sup> On the broader approach to co-operation in leadership between the Lord Chief Justice and the Senior President of Tribunals see, for instance, R. Carnwath SPT, *Justice in a Cold Climate*, 17 November 2010 <<http://webarchive.nationalarchives.gov.uk/20131203071215/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/spt-speech-justice-in-a-cold-climate.pdf>>; Lord Chief Justice and Senior President of Tribunal's Diversity Statement, 5 October 2012 <<https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/message-from-lcj-judicial-diversity/>>.

fair, speedy and efficient, and – perhaps most significantly – that there is a ‘*need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.*’<sup>27</sup> It seems to me that although these duties have been given statutory form they are duties inherent in the Senior President’s leadership role for Tribunals, and equally that of the Lord Chief Justice for our courts.

18. Finally, the Lord Chancellor, Lord Chief Justice and Senior President have joint and several responsibility for the appointment of judges, for promoting diversity within the judiciary, and judicial discipline.<sup>28</sup> Equal access to justice cannot but mean that the judiciary is not a cloistered profession, but one to which any member of society can be appointed on merit. Open justice requires an open judiciary; one in which every part of our democratic societies can see they have a stake. We must therefore ensure that proper and properly open processes are in place to implement these responsibilities.

19. If I can draw these various strands together. Taken together they demonstrate an inescapable conclusion: the judiciary cannot sit on its hands. On the contrary, it is under a wide range of specific duties, each of which in its own way requires the judiciary to secure open justice in each of its facets. As such they are aspects of a wider general duty which, as Lord Thomas recently reiterated, requires judges to ‘*engage in the reform and modernisation of the system of the delivery of justice*’<sup>29</sup>.

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<sup>27</sup> Tribunals, Courts and Enforcement Act 2007, s.2. On the importance of the duty to innovate to the Tribunals see, R. Carnwath SPT, *Tribunal Reform – The Scottish Dimension*, (11 February 2009) at [18]-[24]. <<http://webarchive.nationalarchives.gov.uk/20131203072115/http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/spt-trib-reform-scottish-dim.pdf>>.

<sup>28</sup> Constitutional Reform Act 2005, ss.108, 137A, schedule 14; Tribunals, Courts and Enforcement Act 2007, s.47; Equality Act 2010, ss.50 – 51.

<sup>29</sup> Lord Thomas, *The Rule of Law, the Executive and the Judiciary*, 31st Sultan Azlan Shah Lecture, Kuala Lumpur, at [24] (December 2017). And see Lord Thomas CJ, *Michael Ryle* lecture.

To do so judges ‘*must be proactive in reform. They must also provide the leadership in the major changes that will soon come to legal education and legal practice consequent upon the technological revolution.*’<sup>30</sup> And as he noted there was nothing new in this leadership role, Lord Mansfield CJ was a vigorous leader of reform in the 18<sup>th</sup> Century and Lord Bramwell was equally vigorous in the 19<sup>th</sup> century. Even if it requires the judiciary to engage to a certain degree in policy issues where the proper administration of justice is concerned, the judiciary cannot but be involved.<sup>31</sup>

### **(3) Implementing the duty**

20. It is all very well to note that judges have actively led reform in the past. The past is a different country. How best to implement the duty today? There are two areas in which I believe the judiciary must act to answer this question: Governance and policy; and, Reform. I take each in turn.

#### ***Governance***

21. First, governance. During the course of two public lectures last year – examples of the judiciary communicating its views in a democratic society outside of individual judgments – Lord Thomas outlined the basic requirement: that judiciaries have both ‘*internal cohesion*’ and ‘*good governance*’<sup>32</sup>. Without such structures the judiciary would not be able to carry out its duty effectively. We have flexibility to devise our own structures. Respective Lords Chief Justice and Senior Presidents have done so. It is of central importance that those structures are subject to

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<sup>30</sup> Ibid.

<sup>31</sup> Lord Thomas was not alone in this view, see Lord Browne-Wilkinson, *ibid.* at 56.

<sup>32</sup> Lord Thomas, *Lionel Cohen lecture* at [9].

principled review. As with any large-scale organisation, systems can become outmoded or inadequate; as times change systems also must change. Two questions arise here; and these are as applicable to the UK as they are to the Administrative Office of the United States Courts or Councils of the Judiciary and their equivalents throughout Europe.

22. First, is the structure in place optimal? In the Tribunals, there is an executive body that supports the Senior President: the Tribunals Judicial Executive Board. It is constituted of representatives of the various Tribunals' judges. Within the Tribunals themselves, leadership is provided by Chamber Presidents and deputy Chamber Presidents. This was the right structure in 2007. Is it still the right one today? The more the judiciary as an institution must take policy decisions further to its duty to secure open justice, does this remain the right structure? Might it need to be expanded into, as was suggested over 30 years ago by Lord Browne-Wilkinson, a more '*collegiate body of judges*'.<sup>33</sup> Should it include representatives of the legal profession and civil society among its membership? The benefits of Non-Executive Directors are well-recognised in government, just as they are in business. Ought we not to consider drawing on those benefits to improve our governance, and through this form of engagement with wider society our accessibility? I have recently formed an Administrative Justice Council which I chair and which is administered independently of the executive and Parliament with an academic board to advise upon governance and policy in the law.

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<sup>33</sup> Lord Browne-Wilkinson *ibid* at 56.

23. Secondly, is the management right. The senior judiciary is very fortunate to be supported by a cadre of excellent civil servants, who form the Judicial Office. It is, in essence, a department for the judiciary in miniature. It comes under the aegis of our Ministry of Justice, but consistent with the principle of judicial independence, its members work to the judiciary and not the Lord Chancellor. Should we not also be taking steps to consider whether and in what ways we may need to reform the structure of support we receive? Is the structure right? What might we learn from the latest management techniques? Is the training right? Do we need to ensure that all those who support the judiciary are properly familiar with the digital world? If our courts and tribunals are to be, and they will be in the future, digital by ‘default and by design’<sup>34</sup>, we all need to be properly trained.

24. If, for instance, my Executive Board is to consider properly, policy decisions concerning the redesign of our Tribunals, its advice must be fully informed; greater experience in the digital world will not only ensure that our advice is up-to-date, but equally it will enable those giving advice to be able to go beyond reviewing material. It will enable them to see connections, propose further developments and improvements, that would not otherwise come to light. Just as any company or industry must learn from the latest management techniques, must keep abreast of the latest technological developments and invest accordingly in them, so must the judiciary. The judiciary are practiced in the incremental development of the common law which is an analogous process but we are Judges, we are not historically trained in leadership and management; a point which Richard Posner has recently and interestingly written about. As he put it, *‘Management skills are*

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<sup>34</sup> M. Briggs, *Civil Courts Structure Review – Interim Report* (December 2015) at 4.

*often not positively correlated with judicial ability.*<sup>35</sup> You do not have to engage in the esoteric delights of the economy of law to readily see the truth in that statement. That must change.

25. To better enable the judiciary to discharge its governance responsibilities we need the right structure and the right support. That is not enough; I return to what more is needed in a moment. I do so because it also raises questions; particularly about transparency and accountability. I want to touch on those now. First, transparency. It is important that the public can understand the role that the judiciary plays in society. That judicial independence is, in some parts, being viewed as something which is a matter of judicial self-interest is as dangerous as it is worrying. That judicial independence is not understood to exist, as it does, for the benefit of the public, for society as a whole is a matter which needs to be combated if we are maintain our commitment to the rule of law. It is also, however, important that society understands how the judiciary is run and organised. Transparency, in so far as it does not impair judicial independence – and that is an important caveat – will help understanding. In doing so it may also improve scrutiny. Scrutiny may well prompt debate concerning our leadership and management structures; it may point out issues that – looking at matters internally – we have missed or downplayed. It will help inform the judiciary as much as it will the public. And that will be of benefit to all.

26. Second, accountability. It is well-established that the courts and judiciary are accountable in a number of ways. Appellate accountability for decisions.

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<sup>35</sup> R. Posner, *Divergent Paths – The Academy and the Judiciary*, (Harvard, 2016) at 222.

Explanatory accountability, on the part of the Lord Chief Justice and Senior President as leaders of our respective judiciaries in the justice system. Remedial accountability, to ensure we lead reform; a point I will come to shortly. Democratic accountability, through public procedures and judgments and through disciplinary accountability. We are accountable in many ways. As the judiciary as an institution enters more into the policy arena, it becomes difficult not to grapple with the question of how it is to be accountable for policy decisions. Equally, as the judiciary as an institution works in partnership, as it does through HMCTS, the courts and tribunals service, the question has arisen as to our accountability for implementing decisions taken by government.

27. Historically, the answer to the first point would have been to say that as head of the judiciary and government minister, the Lord Chancellor was accountable to Parliament for any such policy decisions. He was accountable as a Minister not as a judge, even if it was not entirely clear on what basis any particular policy was being considered or implemented. When Lord Browne-Wilkinson considered the creation of a college of judges to take policy decisions, that remained the answer. It is not one available today. As the 2005 and 2007 constitutional and tribunal reforms laid the foundation for increased responsibility on the judiciary to develop policy for the administration of the courts and justice generally, they reformed the Lord Chancellor's role. If, as they do, the judiciary have leadership duties, so must they have responsibilities. So must they be accountable. Accountability must however continue to be informed by the principle of judicial independence; it cannot undermine institutional independence. Is it perhaps time then for consideration to be given to the adoption of the US model of accountability, as

operates through the Administrative Office? Is such a step perhaps more consistent with both the changed role of the judiciary and the duty to secure open justice?

### ***Policy***

28. Constitutional purists may revolt at the idea that the judiciary should involve itself in policy decisions. They may take the view that the judiciary should not be involved in the implementation of government-led reforms. Two points need to be made.

29. First, such points assume – and wrongly assume – that the judiciary, government, and Parliament are and must be hermetically sealed away from each other. They are not. They must and do work together. They are interdependent, albeit they must all be careful to ensure that they do not over-reach into the others' exclusive province. Developing and implementing policies concerning the effective administration of justice do not over-reach. Ensuring judges are trained properly. Ensuring judges' welfare is properly supported. Ensuring judges are deployed to the right courts and tribunals, and have the right level of support within the financial settlement provided by the government and Parliament. Ensuring that our courts and tribunals are open to the public. All these are matters well within the judicial province. A failure to develop proper policies to secure them, would be an abdication of responsibility.

30. Second, our constitutional settlement gives joint responsibility for the courts and tribunals to the government and the judiciary. As it does so, it cannot but be the case that the judiciary works in partnership with the government to effect relevant reform. The judiciary may not, and should not, be responsible or involved in the formulation of government policy, or legislation. That would be over-reaching.



Once that policy has been established, and we must not forget both the government and Parliament are democratically accountable for policy decisions they take, partnership requires the judiciary to work with the government.

31. In acting in this way, the judiciary must however be guided by principle. It was once said by Lord Palmerston, the Britain had no permanent allies, no permanent enemies only permanent interests.<sup>36</sup> The judiciary has and only has permanent interests. They are, as ought to be obvious in the light of what I have already said, to secure the effective administration of justice; or in the words of the judicial oath to *'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will'*. That interest is what must guide and determine any and all policy choices that the judiciary makes through its leadership and management structures.

32. How practical is it to apply this principle and by what means? I suggest that the concept of 'Proportionality' is our practical guide. If I am right then the achievement of our aim can be done through an application of the approach explained by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 (at para.19) and subsequently adopted by Lord Wilson in *(R) Quila v Secretary of State for the Home Department* [2012] 1 AC 621 (at para. 45). As Lord Bingham put it, and I adapt them for present purposes, four factors must be applied:

- First, does the policy objective further open justice?

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<sup>36</sup> For the exact quotation see, D. Brown, *Palmerston and the Politics of Foreign Policy – 1846-1855*, (2002) at 82.

- Secondly, are the proposed implementation measures designed to implement the objective rationally connected to it?
- Thirdly, are they no more than necessary to accomplish the objective;
- Fourthly, do they strike a fair balance between the rights of the individual and the interests of the community.

We can see that these same questions have underpinned the introduction of proportionality, and the more distributive form of justice it entails, into the civil, family and tribunal justice systems in England and Wales through the concept of the ‘overriding objective’ in our procedural rules.<sup>37</sup> It seems to me that in examining our future approach to managing the justice system, to developing and implementing policies relating to it, we must adopt clear guiding principles such as these and apply them. They should be our rule of reason.

33. A clear statement of the judiciary’s permanent interests and the test by which it carries out its duties to further those interests will not only better enable the public and the other branches of the State to understand what is done and why. It will also provide a means by which the judiciary can test its own internal structures, and it will also secure principled continuity in its long-term governance. It will ensure that governance does not wax and wane, as equity was said to do, with the length of the Lord Chancellor’s – or Senior President’s – foot.

## ***Reform***

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<sup>37</sup> As explained by Lord Dyson MR, *The application of the amendments to the Civil Procedure Rules*, (2014) 33 C.J.Q. 124.

34. The development and application of principle and up-to-date management methods is of fundamental importance to reform. Historically reform has been the province of Royal Commissions or individual judges. Some have been advanced based on evidence. Others have not. Some have taken as their basis the idea that a judge knows best how the system operates, how it fails to meet its objectives and what must be done. Some reforms have succeeded. Others have not. And others still simply create problems for future generations to solve; a point Professor Resnik knows only too well. As she has rightly pointed out, *'The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms'*<sup>38</sup>.

35. We are now in a world where such an approach is, quite simply, no longer acceptable. Reform based on the views of a single judge or group of judges, based on anecdote or impression, or even on a certain amount of evidence drawn from willing parties can no longer be the way we approach the matter. Judges while adept at researching the law, are not by and large trained in the skills of empirical, scientific research. They are not well-versed in dispute systems design. They do not necessarily understand or appreciate the connections, or potential connections between the courts, the legal profession, Ombuds schemes and so on. They are not necessarily at home in the digital world, in terms of design and implementation. Sir Michael Briggs, whose excellent report is ushering in the digitisation of our civil courts, is perhaps the last judge who will be in a position to carry out a detailed review of the historic type.

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<sup>38</sup> J. Resnik, *Precluding Appeals*, (1985) 70 Cornell L.R. 603 at 624.

36. We are now in a new, digital world. It is one that will and does require the judiciary to take a more considered approach. We cannot lead reform as an exercise in the ad hoc. In order to understand, to design and to test reform we must, it seems to me, engage far more than we have in the past with academia, with management experts, digital experts, with the professions, regulators, Ombuds and wider society. Reform must be based on proper research; robust and tested. It must consider the latest design techniques. It must be open to scrutiny, and communicated clearly and readily to the judiciary, government, Parliament, the professions and the wider public. It must require us to consider whether our processes are sufficient to modern conditions. There is no point, for instance, being wedded to personal service of process, when we are moving to a digital world where secure service can be effected at the touch of a button. Which of our processes must change, which may fall by the historical wayside? No question can be out-of-bounds. If we are to secure open justice, all questions must be capable of being asked and examined. But examined properly. The judiciary must therefore support, promote, and commission research. Just as the unexamined life is one not worth living;<sup>39</sup> the unexamined and unresearched reform may not be worth taking.

37. One point needs particular emphasis. At the present time, there is a lot of talk about digitising or rebooting justice<sup>40</sup>. ODR has transformed mediation and negotiation. It is also increasingly transforming formal justice systems; as experience in Canada with its Civil Resolution Tribunal and the UK, with the developing Online Civil Court and the development of Online Tribunals shows. They are two examples of a more widespread phenomenon. It is, of course, essential that such developments

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<sup>39</sup> Plato, *Apologia*, s.38a.

<sup>40</sup> See, for instance, B. Barton & S Bibas, *Rebooting Justice*, (Encounter Books, 2017).

do not undermine open justice in any of its facets. On the contrary, we must seize the opportunity they provide to make justice more open still. Digitisation must make process more accessible. It must be used to make hearings more accessible. And it must be used to make judgments, which in turn must be clearer and simpler, more accessible.

38. More importantly, digitisation provides us with an opportunity to devise a new, under-developed, aspect of open justice. It is openness that comes from effective feedback. This has two aspects.

39. First, it provides the opportunity to adopt one of the features of ODR that has made it so successful. As Barton and Bibas explain it, one of the inherent advantages of ODR as it has been developed by Colin Rule is the ability of the systems he designed, such as eBay, to learn.<sup>41</sup> Due to the amount of information the systems gather, they are able to discern patterns, to identify weaknesses, and consequently to redesign, implement change and measure the efficacy of those changes. It is the ultimate in data-led reform. Digitisation will, if we are sensible, provide us with the opportunity to gather data on the operation of our justice systems in ways that we have often been unable to before. It provides us with the opportunity to make our justice systems more adaptive; but again, only after proper scrutiny and discussion.

40. Second, it provides us with the opportunity to reorient our justice systems so that they not only become more accessible, and thus more able to deliver justice; particularly for those who would otherwise be the digital outlaws I referred to at the

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<sup>41</sup> B. Barton & S. Bibas, *ibid.* At 112.

outset. It also provides the opportunity to enable widespread, systemic problems in the application of the law to come to light. It enables us to put in place feedback loops between for instance the justice system and Ombudsman and regulatory bodies. It will thus provide us with the opportunity to bring to light, and public scrutiny, widespread systemic problems with particular legal issues or areas. It will lay open to public scrutiny systemic weaknesses in the rule of law; providing an enhanced means to promote public debate, to highlight how and where public values instantiated in law are not being developed as Parliament intended: to provide observational justice. It will thus increase the ability of courts and tribunals to promote the rule of law. The creation of such feedback loops is an implicit aspiration of our civil court reforms.<sup>42</sup> It is equally something that I am pursuing for the digitisation of the UK's tribunals. We have an opportunity to broaden and deepen our commitment to open justice through digitisation; we cannot let this unique opportunity slip through our fingers.

41. The purpose and principles upon which the courts and tribunals modernisation programme in the UK is based reflect our commitment to the rule of law, access to justice and open justice as distinct from price rationing or austerity management. They are these:

*“The Purpose: to give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at lower cost and safeguards the rule of law by improving access to justice*

*The Objectives:*

- *Ensure justice is accessible to those who need it*
- *Design systems around the people who use them – user friendly, intelligible and comprehensible justice*

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<sup>42</sup> Sir Terence Etherton MR, *The Civil Court of the Future*, (15 June 2017) at [24] <<https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>>.

- *Create a system that is financially viable using a more cost effective infrastructure (better and effective use of IT and new working practices)*
- *Eliminate the most common causes of delay*
- *Retain the UK's international standing as a world class provider of legal services and the judiciary as world leaders in the delivery of justice*
- *Maintain the constitutional independence of the judiciary”*

#### **(4) Conclusion**

42. I have only been able to outline some of the issues, which I believe to be important as we continue to develop open justice in the 21<sup>st</sup> Century. They are, I hope, the starting point of a broader public discussion. I started with a reference to Woodrow Wilson, President of the United States, 100 years ago. As judges must eschew politics rather than history or the law, I will end with a comment by Richard Posner. In considering the question of reform, he said this,

*‘ . . . the Supreme Court is famously backward in utilizing technology, as backhandedly conceded in the Chief Justice’s latest end-of-year report, in which he tries to excuse his Court’s backwardness by asserting that “federal judges are stewards of a judicial system that has served the Nation effectively for more than two centuries. Like other centuries-old institutions, court may have practices that are archaic and inefficient – and some are. But others rest on traditions that embody intangible wisdom.” I (that is Posner) can’t find the wisdom, tangible or intangible, in the archaic and inefficient practices that persist in the Supreme Court, such as the placement of a spittoon beside each Justice’s seat in the courtroom.’<sup>43</sup>*

43. In the UK we do not have anything comparable to such a practice. But the point is well-made. If we are to ensure that our courts and tribunals fulfil their constitutional role, we – as judges – must ensure that they and their processes are not unexamined; that we lead reform in the light of evidence and through the

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<sup>43</sup> R. Posner, *ibid*, at 236.

proper use of expertise. Most importantly, we must ensure that we fulfil our duties and responsibilities as effectively as we can in order to secure open justice for all.

44. Thank you.