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LORD JUSTICE GROSS

HOW CAN JUDGES STRENGTHEN THE RULE OF LAW?

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Introduction

1. It is an honour to have been asked to take part in this J20 conference. The opportunity to exchange ideas and best practice between judicial colleagues from this group of nations is immediately apparent. The larger challenge is to put these exchanges to good practical use and the question which I am privileged to address could not be more important. That question is 'how can judges strengthen the rule of law?'
2. The question is asked against the background of the high aspirations of the United Nations Sustainable Development Goal Indicators[2], including (amongst many others) ending poverty and hunger, promoting gender equality, inclusive and sustainable economic growth and combating climate change. The practical inquiry is how the Rule of Law can advance these goals and how Judges can strengthen the Rule of Law so that it can do so.
3. My theme, in a nutshell, is this: assuming the political will to accomplish the goals of sustainable development, the Rule of Law is essential to their accomplishment. The Judiciary, as the independent third branch of the State, can do much to strengthen the Rule of Law but neither the Judiciary nor the Rule of Law can do it alone. All three branches of the State must respect each other's preserves for the Rule of Law to be sustainable, to flourish and to provide the foundation for the achievement of social goals. That is the theme I shall develop today. The views expressed are my own.
4. The two primary functions of the State can be expressed as follows: the Defence of the Realm and the provision of a justice system. If a State succumbs to its external enemies, all is lost. If a State does not uphold law and justice, no other rights can be enforced or entitlements

[1] I am most grateful to Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and the Master of the Rolls, for his assistance with the preparation of this lecture.

[2] Contained in the *Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators* (2017)

enjoyed. The Rule of Law is crucial to that second function and therefore indispensable to achieving the social goals underlying sustainable development.

5. The Rule of Law is needed in all major spheres of activity[3]:
   (i) Individual human rights – guarding against the midnight knock on the door and the show trial.
   (ii) Investment – who would invest in a country where assets are subject to capricious and arbitrary officialdom?
   (iii) Fighting corruption; no special treatment; no lost files; no convenient delays.
   (iv) Fighting terrorism – the Rule of Law alone will not defeat terrorism but successful counter-terrorism is hugely assisted by the value system inherent in the Rule of Law.

6. Indeed it is difficult to see how progress can be made with the sustainable development agenda, absent the Rule of Law. But law, lawyers and Judges cannot do it all[4]. The law and the Judiciary do not exist in a vacuum. The Rule of Law requires a political acceptance – indeed a political insistence – that it will and should shape the society in question. That calls for mutual respect and understanding between the three branches of the State – Legislature, Executive and Judiciary – notwithstanding inevitable institutional tensions between them from time to time. Moreover, expectations must be managed; though Legislatures not infrequently "out-source" political questions that are too hot to handle to the Judiciary,[5] there are issues that are sometimes best left to the development of a political consensus and are unsuitable for Judicial decision.[6] Judicial development of the law is one thing; judicial legislation may be quite another.

Meaning

7. The most compelling working definition of the Rule of Law was that given by the late Lord Bingham, Senior Law Lord, in his short and incisive book entitled *The Rule of Law*[7]. As he put it, the core of the principle is

[3] On a perhaps lighter note, the absence of the Rule of Law and the insecurity which flows from such absence form the backdrop to two well-known operas – Wagner's *Lohengrin* and Donizetti's *Lucia Di Lammermoor*.
[4] See, *passim, Lord Sumption and the Limits of the Law* (2016)
[5] See, e.g., abortion in the US, *Roe v Wade 410 US 113 (19973);* see too, *And Brett makes five, The Economist,* September 15th – 21st 2018, at pp. 22 and following.
[6] See, e.g., assisted suicide: *Nicklinson v Ministry of Justice* [2014] UKSC 38; [2015] AC 657
[7] (2010)

'. . . *that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts*.'[8]

Lord Bingham went on to identify eight features inherent in this definition. Those were that

- the law must be accessible, intelligible, clear and predictable;
- questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion;
- laws should apply equally to all, save to the extent that objective differences justify differentiation;
- ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – not unreasonably and without exceeding the limits of such powers;
- the law must afford adequate protection of fundamental Human Rights;
- the state must provide a way of resolving disputes which the parties cannot themselves resolve; and that
- the adjudicative procedures provided by the state should be fair – one of the most important rights is the right to a fair trial;
- compliance by the State with its obligations in international law

8. I have focused on a working definition of the Rule of Law. As is plain, the Rule of Law must embrace procedural justice. Warning lights should flash when a law is purportedly retrospective, when an argument is advanced for a court sitting otherwise than in public [9]– and plainly it would be unacceptable if in practice there is one procedure for the powerful or wealthy and a different procedure for others[10]. Substantive justice is more complex. The Rule of Law without *any* substantive content could be used to embrace mass murder, in strict compliance with the law of the land - and would be an empty concept. Conversely, and certainly in the international sphere, there will not be unanimity as to the requirements of substantive

[8] Lord Bingham, *The Rule of Law*, at 8.
[9] Though sometimes it is necessary for a court to sit in private, e.g., when dealing with trade secrets, or, on occasions, national security.
[10] The Judicial Oath in England and Wales is as striking as it is simple: after swearing allegiance to the Sovereign, the Judge swears to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will".

justice – in particular around the edges. The Rule of Law ought not to be the preserve of any one political philosophy or judicial system. Hence, to my mind, the wisdom of Lord Bingham's formulation; whatever disputes there may well be over interpretation and, importantly, who should interpret what[11], I cannot see why the Rule of Law should not embrace *fundamental* Human Rights, such as those contained in the European Convention on Human Rights and protected by the common law for a very long time before.

9. The meaning of the Rule of Law is also well articulated in the *Benchmarks* set out by the *Venice Commission*[12]*,* in its *Rule of Law Checklist*. These capture the essence of the concept and are, in summary:
   - Legality;
   - Legal certainty;
   - Prevention of abuse of powers;
   - Equality before the law and non-discrimination;
   - Access to justice.
10. In some fortunate countries, we tend to take the Rule of Law for granted, which we should not. Even the most fleeting visit to a State which has lost the Rule of Law and a functioning justice system serves as a humbling and moving reminder of its fundamental importance.

Hallmarks

11. I turn to a selection[13] of the principal hallmarks of a functioning justice system, sustaining and giving effect to the Rule of Law.
12. I start with the Judiciary. While an independent Judiciary does not, of itself, guarantee the Rule of Law, absent an independent Judiciary there can be no Rule of Law. In that regard, I cannot avoid, in a Conference of this nature, expressing concern at the all too many States in all parts of the world, where there is real concern that the independence of the Judiciary is under threat – and that threat comes in different forms, ranging from dismissals, the undermining of security of tenure, to the very modern variant of abuse (as distinct from criticism) on social media.

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[11] The concept of subsidiarity and questions of margin of appreciation; see too, Lord Hoffmann, *Judges, Interpretation and Self-Government*, in *Lord Sumption and the Limits of the Law (op cit)*, at pp. 67 and following.

[12] *European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist*, Study No. 711/2013, adopted by the Venice Commission 2016, Endorsed by Ministers' Deputies 2016, Endorsed by the Congress of Local and Regional Authorities of the Council of Europe 2016.

[13] There are of course others; time and space preclude any effort to be exhaustive.

13. Open justice is a key principle. Justice must not only be done; it must be seen to be done. Effective public and media access to proceedings is essential. It helps promote fair process. It inoculates the justice system against arbitrary conduct – the rule of individuals rather than law – which could grow if the courts were shielded from scrutiny. It equally helps demonstrate to the public that the law is applied and how it is applied. It promotes public knowledge of what is being done in the courts. It is a necessity for the exercise of free speech and debate concerning laws, their interpretation and application. It is not just therefore a necessary feature of the proper administration of justice, but equally of the Rule of Law in society as a whole.
14. A facet of open justice is the ready availability and accessibility (very much including on the internet)[14] of judgments. Judgments must be properly accessible both to the parties and to the public. The parties need to know their rights, and, importantly, to understand why the court has arrived at the particular judgment in their case. The public, so that society can understand the law and the decisions of the Courts. Moreover, certainty as to the law is of the first importance (in particular for commercial law), so that individuals and businesses can order their affairs, in reliance on a framework of law. In passing, it is pertinent to ask: are we doing enough to ensure that judgments are intelligible? Can they be understood by the wider public?
15. Furthermore, a functioning justice system must provide effective access to the Courts[15]. While there is room for argument as to detail[16], the principle cannot be in doubt. It is hollow to provide rights without the means of accessing Courts to give effect to them; our concern is with practical not theoretical justice. Effective, readily available, legal advice and representation. Ease and effectiveness of enforcement. Costs that are not to be prohibitive; the Judiciary can properly take steps to ensure that court rules, practices and procedures do not increase the cost of litigation unnecessarily. And within the rules, judges should manage cases[17] so that they are conducted at proportionate cost. Without access, property rights will not be secure, contractual rights will not be capable of ready enforcement: businesses will be neither able nor willing to invest and society will, as a consequence be impoverished. Equally, human and other civil rights and obligations will be incapable of effective implementation. Both the socio and economic demand of law will go unmet. The goals of sustainable development could not be achieved.

[14] For instance, via court websites or websites such as BAILLI.
[15] See, Lord Reed in *R(UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409, at [68]
[16] The types of legal representation available, the resources committed to Legal Aid and so on.
[17] More on *case management* below.

16. Let me linger on civil justice, as it is all too easily neglected. Civil justice is a public good.[18] Its provision is an integral part of the State's duty; as with the rest of the justice system it is not just another public service. As Lord Diplock expressed it:[19]

"Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access."

A shared endeavour

17. As already emphasised, all three branches of the State, Legislature, Executive and Judiciary[20] have an integral part in securing the Rule of Law. This is a shared endeavour. There needs to be a genuine commitment from the other branches of the State to judicial independence. It also requires such a commitment across society more broadly. The Judiciary's independence must be respected, and its decisions implemented. This does not mean that the Judiciary should be immune from criticism or that judicial decisions should be shielded from public debate. We can all think of judicial decisions with which we do not agree. It would be a strange state of affairs were it otherwise. Such decisions ought properly to be subject to reasoned debate and discussion, characteristic of a democratic society and serving to strengthen the Rule of Law. Such healthy challenge or disagreement is to be contrasted with abuse, from whatever quarter[21], intended to undermine Judicial independence, to which I have already referred. For the judiciary to properly carry out its role, it is necessary for it – as an institution – to be afforded a proper degree of respect and confidence by the other branches of the State and civic society generally[22]. On the part of the Legislature and Executive, this calls for a constitutional understanding of the role of an independent Judiciary, even, perhaps especially, in response to adverse decisions. Lord Bingham again[23]:

> "There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live."

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[18] See, the 2008 Hamlyn Lectures by Prof. Dame Hazel Genn DBE, *Judging Civil Justice* (CUP 2009).
[19] In *Bremer Vulkan v South India Shipping Corp* [1981] AC 909, at p.976
[20] See, Alexander Bickel, *The Least Dangerous Branch* (1962), *passim*. As Alexander Hamilton expressed it, the Judiciary has no influence over either "the sword or the purse".
[21] Whether government inspired, mainstream media or social media driven.
[22] The Rt Hon The Lord Burnett of Maldon, *Becoming Stronger Together*, Opening Speech at the CMJA Annual Conference, in Brisbane, 10 September 2018, at [27] and following.
[23] *The Rule of Law,* at p.65.

Respect for the Judiciary as an institution is respect for our shared endeavour in the Rule of Law.

18. Let me, however, be clear. The demands of respect cut both ways[24]. The quality of reserve or restraint is one of the Judiciary's great strengths and keeps judicial decision-making within its proper ambit.[25] Judges do not court public controversy; they are also not and should not aspire to be "celebrities". For the Judiciary to properly carry out its role, it must equally respect the roles of the other branches of the State. Institutional over-reach by the Judiciary is as much to be deprecated, as it is in any of the other branches of the State. Certainly, in a common law system, judicial development of the law is inevitable – but there are limits to proper judicial law-making. There must be respect for "comparative institutional competence"[26]. Over-reach by the Judiciary through, for instance, judges entering into the political arena – the proper province of Executive and Legislature – cannot but draw the judiciary into disrepute. A politicised, political judiciary is one that would not be seen as capable of providing unbiased decisions based on the application of right law to right fact. Public confidence in the judicial function would be undermined, which in turn would undermine confidence in the rule of law.

19. Pulling these threads together: for judges to strengthen the Rule of Law, there needs to be a proper recognition and respect for their institutional and individual independence, while recognising the interdependence of the three branches of the State. Judges and Judiciaries should therefore ensure that they carry out their functions in ways which properly maintain, as Lord Hope put it '*the mutual respect which each institution has for the other*'.[27] Equally, they must ensure that they do not act in ways that compromise their independence whether directly or indirectly, so that they are able to maintain public confidence in them and the role they play in securing the Rule of Law.

Judicial Leadership[28]

20. The most important task of a Judge is trying cases or hearing appeals. However, looking beyond that primary and essential task, a critical contribution to the strengthening of the Rule of Law and a functioning justice system is provided by judicial leadership. The range and

[24] Lord Burnett, *ibid,* esp. at [37]
[25] Lord Justice Gross, *The Judicial Role Today,* Queen Mary University, Law and Society Lecture (London 23 November 2016).
[26] Alan Paterson, *Final Judgment* (2013), at p.276.
[27] *R (Jackson & Ors) v Her Majesty's Attorney General* [2005] UKHL 56; [2006] 1 AC 262, at [125].
[28] Sir Peter Gross, *Judicial Leadership,* Gresham College Lecture, Barnard's Inn (23 June 2016)

extent of judicial leadership is striking; some aspects are traditional, of very long standing and taken effectively for granted. Others involve little short of a sea change.

21. Let me highlight four aspects of judicial leadership, at least as they apply in England and Wales. First, developing the substantive law. Secondly, developing procedural law – focusing here on "case management". Thirdly, leading reform of the justice system. Fourthly, promoting the Rule of Law internationally. Overall, judicial leadership calls for fearless independence, while concurrently recognising that the Judiciary does not exist in splendid isolation, coupled with a readiness to cooperate with other Branches of the State when to do so will secure the administration of justice. In this way, judicial leadership contributes to setting the tone for the relationship between the Judiciary and the other branches of the State.

22. *Substantive law:* In our common law system, the Judiciary has as central a role in developing the law as does Parliament – subject of course to Parliament's constitutional right to amend, revise or correct the common law system through statute. This is the traditional role of the Judiciary, developing the common law by way of a "fourfold method"[29]: evolution, experiment, history and distillation. Here lies the genius of the common law; its ability to adapt to changed circumstances, so maintaining its relevance. It is not static; the product of a moment in time. This development of the law is plainly Judiciary led and calls for a careful balance between creativity, judgment and reserve or restraint.

23. *Procedural law – case management:* The Judiciary's role in procedural reform can be traced back at least to the 1820s[30] but I confine my focus here to active judicial case management, a feature now embedded in all our jurisdictions (crime, civil and family). It is difficult to over-emphasise the cultural sea-change; the Judiciary has moved from a passive umpire (in the cricketing sense[31]) to taking a "grip" on the case, both pre-trial and at trial. To continue the cricketing analogy, Judges are still umpires but they now take a keen interest in the over rate and in the preparation of the pitch[32]. We have become "allergic to adjournments". Case management reforms have been Judiciary led; they would not have happened without determined and sustained judicial leadership; they would not, however, have succeeded without the active support of the legal professions and other agencies involved[33]. The philosophy requires Appellate Courts to support robust case management decisions of lower

[29] 2013 Hamlyn Lectures, Sir John Laws, *The Common Law Constitution*, preface, p. xiii.
[30] At an even earlier stage, Lord Mansfield CJ was anxious to speed up the Court's procedures: see, Poser, *Lord Mansfield: Justice in the Age of Reason* (2013), at pp. 202 and following.
[31] Calling "balls and strikes" in baseball terms, an observation attributed to Chief Justice Roberts, in *The Economist* 8th-14th September, 2018, at p.35
[32] Consider too the pro-active role of rugby referees in today's game.
[33] For instance, the police and the Crown Prosecution Service in the criminal jurisdiction.

court Judges, save where something has gone seriously wrong. Though sounding unglamorous, case management is itself of considerable significance for strengthening the Rule of Law. By requiring the parties to identify the real issues in dispute at the earliest possible stage, it reduces the time and cost of litigation. Likewise, it reduces delays in the system as a whole – and justice delayed runs counter to the Rule of Law, even in legal systems where delays do not facilitate or encourage corruption[34].

24. *Reform of the justice system:* In England and Wales we are currently embarked upon a radical and ambitious court reform programme. It is one which (together with others) I was instrumental in shaping when I had the privilege of serving as Senior Presiding Judge for England and Wales[35]. The Reform programme is not an IT programme but it is IT enabled. It seeks to harness technology to improve the delivery of justice in a manner appropriate to the 21st century. It has as its aim a justice system that is digital by default – rather than paper-based. It includes the development of online, or digital forms of justice, including the incorporation of ADR to a greater extent than previously within our small claims process; online filing of claims and evidence; online case management; video hearings. But, recognising that we are dealing with the delivery of justice, we are taking the necessary steps to ensure that it remains open justice, publicly accessible. It is also necessary to build in safeguards and support for those without internet access or capability. If we succeed – and we must succeed (there is no Plan B) – we will develop a more accessible justice system, so strengthening the Rule of Law and, in doing so, reduce the cost both to the State and, crucially, to litigants. Judicial leadership is crucial to the success of the Reform Programme, a view supported by both the previous and present Lord Chief Justices and the Senior President of Tribunals[36]. Judges and only Judges – working properly within proper constitutional bounds – have the experience to do so. They have a detailed understanding of what works. And crucially, they are able to provide their expertise on such matters as the necessity and nature of procedural justice and the role it plays in securing fair and just decisions. The Judiciary, however, could not do it alone; the Reform programme is an outstanding example of the closest cooperation between the Judiciary and Executive to strengthen the justice system and, thus, the Rule of Law.

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[34] A real danger in some systems.

[35] 2013-2015

[36] See, for example, Lord Thomas CJ, *The judiciary within the state – the relationship between the branches of the state* (Ryle Lecture, 15 June 2017) <https://www.judiciary.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf>; Sir Ernest Ryder SPT, *Securing Open Justice* (Max Planck Institute Luxembourg for Procedural Law & Saarland University, 1 February 2018) <https://www.judiciary.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>.

25. *Promoting the Rule of Law internationally:* Promoting the Rule of Law internationally is the unifying principle underlying our Judiciary's involvement in international work. We seek to work both bilaterally and multilaterally – this Conference and our work in the Standing International Forum of Commercial Courts ("SIFoCC") exemplify the latter. Such engagement means we learn from one another and can share our experiences and best practice. It is an exercise to which we can all commit ourselves; the Rule of Law at home is strengthened by its promotion internationally. The task of judicial leadership in this area is to set the goals and prioritise accordingly.

Education

26. By definition, we believe in the Rule of Law and a functioning justice system. But what do we do to explain all this to others? We should not assume support without working to achieve it. Here, therefore, I want to highlight the importance of judges playing a role in civic education, as a means of encouraging an understanding of the Judiciary, their role and relationship with the Executive and Legislature. It is an essential means of explaining the importance and function of judicial independence, of judicial accountability through appellate review and security of tenure. Explaining such matters, as well as the extent and the limits of judicial power, cannot but invigorate our shared enterprise and the Rule of Law.

27. In England the Lord Chief Justice has recently established a schools engagement programme. Its aim is to enable individual judges across the country to visit schools. There they will be able to explain what the justice system does, what they do, why and how they do it. Such schemes, and similar engagement through press conferences, such as the Lord Chief Justice's annual press conference, and through attending Parliamentary committees, such as the Justice Committee and Constitution Committee, to explain matters of relevance to the Judiciary and the operation of the justice system, are all ways in which judges can engage and educate. They are all ways in which, as judges, we can help foster a Rule of Law culture.

Conclusion

28. I conclude by way of a recap of my theme, formulated in brief propositions:
    (1) The Rule of Law is essential to the implementation of the social goals of sustainable development.

(2) The Rule of Law cannot be sustained by the Judiciary alone; it requires constitutional understanding from and the support and commitment of the other branches of the State, together with civic society as a whole.
(3) The Judiciary must fearlessly defend its independence as the third branch of the State but independence does not equate to splendid isolation.
(4) What is required is mutual respect between the three branches of the State, respect strengthened on our part by judicial reserve and avoidance of over-reach.
(5) The Judiciary can and should strengthen the Rule of Law by insisting on and defending its independence, open justice and accessible justice. Judicial leadership makes a crucial contribution to strengthening the Rule of Law, extending to substantive law, case management, reform of the justice system to meet contemporary needs and a commitment to international relations – evidenced by our work together here.
(6) The Judiciary should not assume that the truths of which we are persuaded are self-evident to all; effort put into public education will not be wasted.

29. Thank you.

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