



JUDICIARY OF
ENGLAND AND WALES

THE CIVIL JUSTICE SYSTEM IN A TIME OF CHANGE

LCLCBA ANNUAL LECTURE JANUARY 2019¹

1. As a past-Chairman of the LCLCBA, it is a real pleasure to be here this evening and to deliver the Association's Annual Lecture, a privilege I last enjoyed in November 2012². Thank you for the invitation. I have always seen the LCLCBA as serving to connect the common law and commercial bars – a matter of importance, as neither the law nor the legal professions should comprise compartmentalised silos.
2. The topic this evening is “The civil justice system in a time of change”. On the one hand, certainty in the law is an interest of great importance especially in the area of commercial law. So too, the fundamental values of or underpinning the common law are, I hope, immutable: the rule of law, fairness, open justice and so on. That is not, however, to reject

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

² Sir Peter Gross, *A view across the system*, LCLCBA Annual Lecture, 21 November 2012.

change; anything but. Change is a constant; it is integral to the development of the common law itself, as it adapts to new circumstances. It is essential if English Law and London are to maintain and enhance their world leading positions in international dispute resolution. It is or ought to be central to the manner in which justice is delivered where, put bluntly, it would be bizarre to ignore technology enabled developments. In short, we should welcome and help shape the changes which must be made. In all this, we do well to remind ourselves of the observation in Lampedusa's, *The Leopard*, "If we want things to stay as they are, things will have to change" – or as Thomas Babington Macaulay put it during the debates that would ultimately lead to the Great Reform Act of 1832, '*Reform, that you may preserve*'.³ If we want to preserve, to enhance, the best features of our civil justice system we must not just accommodate change: we must embrace it.

3. My theme is encapsulated in the following propositions:

- (I) Civil justice is a public good – not simply another public service.
- (II) The Judiciary and the legal profession are key to the civil justice system's success domestically and internationally.

³ T. Babington Macaulay, *Parliamentary Reform, A Speech Delivered in The House of Commons on 2 March 1831*, in *The Miscellaneous Writings and Speeches of Lord Macaulay*, Vol. 4 <http://www.gutenberg.org/files/2170/2170-h/2170-h.htm#link2H_4_0005>.

- (III) The Courts and arbitration are mutually supportive; the strength of the English Courts improves the attraction of London arbitration and *vice versa*.
- (IV) The Rolls Building is not an island unto itself; commercial and other specialist practitioners need to have regard to the wider civil justice system.
- (V) Change at every level – including substantive law, procedural law, delivery of justice – should be welcomed and shaped.

I should make it clear that the views expressed are my own.

(I) Civil Justice is a public good

- 4. Let us be clear as to our starting point. The State has two primary duties: Defence of the Realm and the provision of a justice system. If the State succumbs to its external enemies, all is lost. If the State does not uphold law and justice, no other rights can be enforced, or entitlements enjoyed.
- 5. The provision of Civil Justice by the State is an integral part of that second duty. The provision of civil justice is a public good, securing the rule of law, not simply another public service.⁴ Unfortunately, it has not always

⁴ Professor Dame Hazel Genn, 2008 Hamlyn Lectures, *Judging Civil Justice*, at pp.16 and following; Dr John Sorabji, *English Civil Justice After the Woolf and Jackson Reforms* (2014), at pp. 10-11.

been seen that way; too often, it has been treated as a Cinderella⁵, ranked somewhat lower in the State's priorities than the criminal or family justice systems, even though it was the means by which the other systems were to a significant degree funded. This acute problem, repeatedly observed by members of the senior Judiciary over the past decade, rests on a failure to fully appreciate that the provision of an accessible and effective civil justice system is an integral part of the delivery of one of the State's primary duties: the provision of an effective means through which law and justice can be upheld – a system which enables litigants to vindicate and enforce their legal rights.

6. The fallacy was that civil justice was a consumer service providing no more than a private good to individual litigants. It was disposed of by the Supreme Court recently in the *Unison* case.⁶ The precise issue in dispute concerned the imposition of fees imposed by the Lord Chancellor in relation to bringing proceedings in the Employment Tribunal and Employment Appeals Tribunal and thus impacted on access to those Tribunals – rather than the civil courts. The principle, however, concerned

⁵ See, Sir Jack Jacob, *The Fabric of English Civil Justice* (Stevens 1987), at p.253; Sir Michael Briggs, *Civil Court Structure Review – Interim Report* (2015)

⁶ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

both courts and tribunals;⁷ no distinction was to be drawn between the different courts and tribunals.

7. For the Supreme Court, the idea that the courts simply provide private benefits was 'demonstrably untenable'.⁸ The ability to access the courts to vindicate and enforce rights was inherent in the rule of law. It is the means by which the State ensures that it acts within the laws provided by Parliament and developed by the common law. It thus ensures that the Executive acts within the law. It is the means by which the State ensures that its citizens are able to vindicate and enforce their rights and obligations, benefits and burdens that the law provides and recognises. It is the means by which the State ensures that the democratic process does not, as Lord Reed put it, 'become a meaningless charade' by ensuring that Acts of Parliament are capable of enforcement.⁹

8. On its own that would be sufficient to demonstrate how the civil courts provide a public good. Matters do not, however, end there. Through the civil courts explaining and developing the law, civil justice provides the framework within which citizens and government can order their affairs and settle their disputes, as well as providing the means through which

⁷ Lord Reed, at [67].

⁸ Ibid.

⁹ Ibid at [68].

that framework of law can be developed through the common law method.¹⁰ And it provides the means by which disputes can be avoided: the deterrent effect of the knowledge that enforcement of rights is within the reach of all our citizens is a fundamental means by which we promote compliance with rights and obligations in the first place. The public good that the civil courts provide is therefore one that promotes the rule of law in a number of different, although related, ways. It is, as Lord Diplock expressed it, a hallmark of every “civilised system of government”.¹¹

9. My starting point then is simple. Civil justice is a public good. It must be understood to be so and treated accordingly. A straightforward test for reforms proposed or made in this time of change is this: does the reform improve our ability to deliver that public good? Does it improve the civil courts as a pillar of democracy? With this in mind I turn to my second proposition: the importance of the judiciary and the legal profession.

(II) The Judiciary and the legal profession are key to the civil justice system's success domestically and internationally

10. The strength of any justice system is to a large extent the product of the quality and experience of its judiciary and its legal profession. Quality has a number of facets. Independence of mind is essential. As is moral

¹⁰ Ibid at [68]-[70].

¹¹ *Bremer Vulkan v South India Shipping Corp* [1981] AC 909, at p.976

courage; the ability to resist improper pressure, to do what is right without fear or favour; to inform your client of what it is necessary for them to hear in terms of your advice; to make that submission in the face of an unsympathetic or, even hostile, tribunal. Judgment too is essential. Practical judgment and legal judgment. The judgment that (in our system) comes from experience in the application of law, in advising clients and in arguing and deciding cases.

11. These characteristics have for a long time been synonymous with the English judiciary¹² and our legal profession. They are characteristics which have been honed not simply in domestic advisory work and litigation but also through practice abroad in the international sphere. As solicitors' firms and chambers have expanded overseas, this cross-fertilisation of practice has been enhanced not just by our lawyers practising abroad, but through overseas lawyers building their practices here in the UK (and, especially, in London).

12. If we are to maintain our ability to deliver high quality justice we must ensure that both the legal profession and the judiciary remain of the

¹² Strictly, English and Welsh

highest quality. And we must ensure that their expertise is accessible to those who need to call upon it. The rule of law, as Lord Reed's judgment makes abundantly clear, requires it. Equally, it must remain of the highest quality if the English courts, and here I am particularly thinking of the Commercial Court and the other courts now within the Business and Property Courts, are to remain attractive for overseas litigants.

13. Focusing for the moment on the Judiciary and as I have previously suggested¹³, the Judiciary's independence, integrity and incorruptibility are beyond question; so too its impartiality: the English courts do not confer a "home ground" advantage and there is neither advantage nor disadvantage in being a private or a state enterprise. Furthermore, there is the Judiciary's well-respected calibre and expertise, generating market confidence.

14. That all these are necessary attributes is illuminated by our work on the *Standing International Forum of Commercial Courts* ("SIFoCC"). The Judiciary is well aware of competition in the market for international dispute resolution, together with the desire of many jurisdictions to

¹³ Sir Peter Gross, *A Good Forum to Shop In: London and English Law Post-Brexit*, 35th Annual Donald O'May Maritime Law Lecture [2018] LMCLQ 222 ("*The Donald O'May Lecture*"); *Courts and Arbitration*, 2nd Jonathan Hirst QC Commercial Law Lecture [2018] LMCLQ 497 ("*The Jonathan Hirst QC Lecture*").

develop their own commercial courts. We have embraced these developments constructively and with confidence, through the mechanism of SIFoCC¹⁴, seeking cooperation, sharing best practice and making a stronger contribution to the rule of law together than each of the courts involved could accomplish individually. Attending the 2nd SIFoCC forum in New York in September 2018, I was struck by the benefits of such cooperation – including outreach to various developing countries¹⁵ – and also by the need to stay at the top of our game, given the formidable nature of international competition on display. The very high regard in which our Judiciary is held internationally (for the qualities I have underlined) is gratifying (and humbling) and one of our greatest strengths – and we need to do everything we can to continue to justify this reputation. Matters do not end there; international competitiveness demands suitable attention to facilities, resources and infrastructure; thus the New York Court building in which SIFoCC principally took place was not only grand (as is the RCJ) but it was also impeccably maintained. Furthermore, the urgent need to make full use of IT (again, more later)

¹⁴ A far-sighted innovation of Lord Thomas CJ, ably supported by (*inter alia*) Sir William Blair and Sir Robin Knowles.

¹⁵ Urged by the World Bank and others to establish Commercial Courts, as a loan condition.

was underlined by the contributions to the debate from others across the spectrum of developed and developing countries.¹⁶

15. As SIFoCC so clearly demonstrates, there is certainly no room for “Podsnappery” – the insular complacency, wonderfully described by Charles Dickens in *Our Mutual Friend*:

“Mr Podsnap was well to do and stood very high in Mr Podsnap’s opinion. Beginning with a good inheritance, he had married a good inheritance, and had thriven exceedingly in the Marine Insurance way, and was quite satisfied..... Mr Podsnap’s world was not a very large world, morally; no, nor even geographically: seeing that although his business was sustained upon commerce with other countries, he considered other countries, with that important reservation, a mistake and of their manners and customs would conclusively observe, ‘Not English!’ when PRESTO! with a flourish of the arm, and a flush of the face, they were swept away.”

16. As to the legal profession, it is important to ensure that access is based on merit, drawing on the widest possible pool of young applicants. In that regard, a careful eye needs to be kept on the cost of qualification – as each well-intentioned step (and the burden of regulation) tends to result in increased expense, whether borne by new entrants or the profession as a whole. From my own experience, I know that the Inns of Court have these concerns very well in mind.

¹⁶ The contribution from Uganda was particularly noteworthy.

17. It is only if we maintain a vibrant legal profession today that we will maintain a high quality judiciary. That is a necessary but not sufficient condition for maintaining high standards. As is well-known, over recent years it has become increasingly difficult to recruit and retain candidates of sufficiently high calibre to the bench.¹⁷ As I, and I am not alone in this, have said on a number of occasions if we do not address this problem, then over time the quality of our trial and appellate judiciary will decline. There can be no doubting the importance of the Judiciary and the courts to our international standing – a pivotal role, constantly emphasised in my own experience of international judicial relations; we punch at or above our weight because of the gratifying international respect for our Judiciary. Any decline in the quality of our Judiciary will not only undermine confidence in our courts but will likewise pose a threat to London as an arbitration centre. Bearing in mind that in this context there is market choice, the requirement is for Judges and appellate Judges in whom the market has confidence.

¹⁷ Judicial Appointments Commission, *Annual Report 2016-2017*, at 14 <https://jac.judiciary.gov.uk/sites/default/files/sync/about_the_jac/annual-report-2016-17.pdf>; Judicial Attitude Survey 2016 <<https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>>

18. Still further, any decline in the quality of our legal profession, our judiciary and the administration of courts and tribunals, raises concern as to this crucial pillar of democracy – which secures the rule of law. If we do not maintain a standard of excellence – for which we are internationally respected - we risk degrading our democracy. We are dealing here with something rather more than the price for a consumer good.

III. The Courts and arbitration are mutually supportive

19. Our civil justice system is more than our civil courts. They are one part of a wider whole, which also encompasses arbitration. The two are mutually supportive, enjoying a symbiotic relationship where the strength of one helps secure the strength of the other.¹⁸ I do not see the court and arbitration as in a competition involving a “zero-sum” game, whereby the gain of one means a loss for the other.

20. Arbitration’s strength is one facet of the framework of law that the civil courts help provide. Through the *Arbitration Act 1996*, the English courts provide a light-touch supervisory and accessory role supporting arbitration. As Lord Thomas CJ succinctly expressed it, their role is one of “*Maximum support. Minimum interference*”.¹⁹ I agree. The courts

¹⁸ Should international mediation grow in the future, the two might become three.

¹⁹ Lord Thomas CJ, *Commercial Dispute Resolution: Courts and Arbitration* (6 April 2017, Beijing) at [25].

provide support through ensuring that English law maintains its commitment to party autonomy, to certainty and predictability in contract and commercial law. And through ensuring, where necessary, that the law develops.

21. There has been some debate in this regard as to whether the 1996 Act has reduced the (Commercial) court's ability to ensure that the law can develop appropriately. To my mind, the balance it has struck through the test for appeals on points of law is broadly right. It is a test that properly respects party autonomy, while enabling appropriate disputes to come before the courts. Support where it is wanted and where it is needed. Otherwise, as in many other aspects of dispute resolution, party choice is respected, with an emphasis on finality, in accordance with the wishes of the parties.

22. The support that the courts provide for London arbitration is one that is reciprocated. It is fair to say that the dynamism of London arbitration is, in its own right, a real strength of legal London and of the City of London. Most obviously, arbitration has provided cutting edge cases for the courts to consider on many occasions in the past and continues to do so today²⁰.

²⁰ Simply by way of example, *The Achilleas* [2008] UKHL 48; [2009] 1 AC 61

English common law and particularly commercial law has, to a significant degree, been shaped by material provided by Commercial Court or arbitral proceedings.²¹

23. The support arbitration provides for the courts goes beyond furnishing material through which the common law and commercial law can develop. While arbitrations may mean that some disputes do not come before the courts, the practical experience derived from arguing those arbitrations and deciding them is not lost to the courts. It is experience that can and is brought to bear in arguments before the courts. What the court loses in terms of some precedent as disputes are determined by arbitration, it still gains albeit indirectly. And experience gained in arbitrations both in London and abroad increases the skills and attractiveness of our legal profession and our judiciary, thus increasing the international reputation of our courts and those who practise in them.

24. There is of course scope for more. Each is or ought to be receptive to learning from the other, to the mutual benefit of both, especially perhaps in the realm of procedural innovation.

25. Looking ahead in arbitration, I add four points:

²¹ As Lord Goff memorably put it, '*For the English, the characteristic commercial contract is a contract for the carriage of goods by sea.*' Lord Goff of Chieveley, *The Future of the Common Law*, 46 *Int'l & Comp. L.Q.* (1997) 745 at 751.

- (1) First, to my mind, the place of international arbitration in global dispute resolution is secure. At its most basic, it fills the essential need of providing a neutral forum, with appropriate expertise, for the resolution of international commercial disputes, without requiring either party to agree to the other's court jurisdiction. From the vantage point of Legal UK, the preservation and strengthening of London's world-leading position as an arbitration centre or hub, is a matter of the highest importance.
- (2) Secondly, London arbitration ought to be wholly unaffected by Brexit. Even if any uncertainty attached to the enforcement of English judgments in EU territories (and please note the heavy underlining), no similar uncertainty affects English arbitration awards. The New York Convention has nothing to do with the EU and Brexit will not impact upon it at all.
- (3) Thirdly, there are some sensitive issues of policy surrounding areas which may or may not be appropriate for arbitration with its attendant confidentiality. The most topical, if not the only such area, concerns Non-Disclosure Agreements ("NDAs") in certain contexts.

(4) Fourthly, arbitration needs to be alive to international sensitivities.

Thus, at the recent and impressive J20 gathering in Argentina²², there was a distinct coolness from some to international and, especially, investment arbitration. There is undoubtedly a need for international arbitration to be perceived as fair to developed and developing world alike.

(IV) The Rolls building is not an island unto itself

26. The Business and Property Courts, bringing together all the specialist jurisdictions of the High Court in England and Wales – the Commercial Court, the Chancery Division and the Technology and Construction Court – in the Rolls Building and in major centres throughout England and Wales, facilitates the appropriate cross-jurisdictional deployment of Judges with suitable experience and expertise. It is an interesting development, if, as always, it is necessary to ensure that otherwise beneficial reforms do not have unintended consequences – here, that it must not be allowed to dilute the brand of the Commercial Court, a matter of the first importance to our standing internationally.

27. For tonight's purposes, however, the relationship between the Rolls Building jurisdictions is not my point. Each may be regarded as at the

²² October 2018

cutting edge of civil justice, with an international dimension. My point tonight is that, collectively, the Rolls Building jurisdictions are one part of the wider whole of our civil jurisdiction. They are not islands unto themselves. Just as the relationship between the courts and arbitration can rightly be said to be symbiotic, the same is true of the Business and Property courts and the other civil courts. The strength of one is the strength of all. We cannot focus solely on investment in our Rolls Building courts. The system as a whole needs sufficient investment. Only if the system as a whole works well, will we be able to properly develop the law and secure the rule of law. We cannot and will not do so if we allow large parts of the system to decline or be degraded while supporting one or more specific parts of it.

28. A commitment to the rule of law is not divisible. We must maintain the integrity and accessibility of the system as a whole. Moreover, our international reputation will not be enhanced if only one part of our system thrives, amidst decline elsewhere.

(V) Welcoming and shaping change

29. This takes me to my final proposition: change. The common law and our civil justice system have always been, and remain, in a constant state of evolution. If we are to remain a jurisdiction which can deliver effective

justice to all domestically and a good forum to shop in internationally - in an intensely competitive market - we cannot rest on our laurels. Change has a number of different facets:

- (1) Substantive law;
- (2) Procedural law;
- (3) Harnessing technology to reform the delivery of justice;
- (4) Brexit.

30. *First, substantive law.* A central feature of our common law system has been its ability to adapt to meet the needs of the time. It is a living instrument providing citizens with a system of practical justice relevant to the times in which they live.²³ Through the careful, considered, fourfold common law method, as Sir John Laws described it in his outstanding Hamlyn Lectures²⁴ - evolution, experiment, history and distillation - it has developed in the light of changing circumstances and ensured that our law is not the product of a single moment in time. And when it goes wrong, as it occasionally does, it is able to correct itself, as anyone who recalls the circumstances and decisions running up to *Anns v Merton*

²³ Lord Nicholls, in *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41; [2005] 2 AC 680, at [32] *et seq*

²⁴ *The Common Law Constitution* (2014), Preface, at p.xiii. (CUP). See too, The Rt Hon. Sir Philip Sales, *The Common Law: Context and Method* (2019) 135 LQR 47, esp., at p.55.

London Borough Council [1978] AC 728 and *Murphy v Brentwood DC* [1991] 1 AC 398 will know.

31. None of this is new. As so often, Lord Mansfield CJ illuminated the path, graphically conveyed by his biographer in these words:²⁵

“Mansfield’s decisions in commercial cases, as in other areas of the law, were intensely practical. Where he thought it necessary or appropriate, he abandoned the formality of traditional common law pleading rules in order to provide legal protection to a broad range of commercial assets, transactions and practices. His aim was to get as quickly as possible to the essential issue or issues involved in a dispute and to resolve the dispute in accordance with principles of justice and fair dealing.”

Lord Mansfield, combining principle and pragmatism, prized certainty, built on the customs and usages of merchants and developed English law in a manner which greatly facilitated international commerce. Think of freedom of contract, credit, marine insurance – all these were developed under Lord Mansfield’s judicial leadership. They all involved harnessing and shaping change – not resisting it. Had the common law set its face against commercial developments, it would have become a dead-letter. The example of Lord Mansfield is telling, all the more so in the area of commercial law, which exists to facilitate commerce - or as

²⁵ Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason* (2013), at p.229

Lord Steyn put it with regard to contract law more generally, to give effect “to the reasonable expectations of honest men”.²⁶

32. Let us linger a little longer on this theme. The Judiciary pro-actively seeks to stay in touch with an ever-changing commercial world – hence the importance attached to the Financial Markets Law Committee (“FMLC”), with its wide-ranging programme covering developments in the City and the longstanding existence of the Commercial Court Users’ Committee. We seek to strike the right balance between the certainty of long-standing, settled rules and the desirability of change and, in this regard, pay close attention to the views of the market and the position prevailing internationally, in aiming to do practical justice. A recent example which gave rise to such considerations is the decision of the Court of Appeal, of which I was a member, in *Stallion Shipping Co SA v Natwest Markets PLC (The MV Alkyon)*²⁷. I hope Lord Mansfield would have approved!

33. *Secondly, procedural law.* Examples spring readily to mind. To begin with, case management. In the Commercial Court, this long preceded the Woolf Reforms but there has been a revolution in this regard, with case management now firmly entrenched in all our jurisdictions²⁸. It is,

²⁶ *Contract Law: Fulfilling The Reasonable Expectations of Honest Men* (1997) 113 LQR 433.

²⁷ [2018] EWCA Civ 2760.

²⁸ Civil, crime, family and tribunals

properly so-called, a real example of cultural change. Next, the Business and Property Courts are grappling with the problems of disclosure in the digital age – in keeping with market demand. Still further and recently, the Court of Appeal has considered the law of privilege, most notably in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*²⁹ [2018] EWCA Civ 2006, where particular attention was paid (*inter alia*) to international developments.

34. *Thirdly, harnessing technology to reform (or modernise) the delivery of justice.* Modernisation means, of course, greater use of technology. This is being delivered through the HMCTS Reform programme, with which I was deeply involved at its inception, when Senior Presiding Judge. There can be argument as to the details and there *should* be debate as to how modernisation (or reform) is accomplished, in particular with regard to preserving open justice and safeguarding access for those with IT difficulties. Modernisation must of course be carried out effectively, as recently highlighted by Lord Burnett CJ.³⁰ There is ample scope for such debate – but there is no alternative to modernisation other than setting our face against technology. That would be bizarre and would wholly fail

²⁹ [2018] EWCA Civ 2006

³⁰ Lord Burnett CJ, *The Cutting Edge of Digital Reform*, (3 December 2018) passim <<https://www.judiciary.uk/wp-content/uploads/2018/12/speech-lcj-online-court.pdf>>

to recognise the changed world in which we live. Moreover, it would be to set our face against the means by which we can ensure our civil justice system can better deliver justice and increase access to justice in so doing, going back to the straightforward test for reforms suggested earlier.

35. *Fourthly, Brexit.* I make it plain that, as a Judge, I express no view whatever as to the politics of Brexit, one way or another and would not want to be misunderstood in that regard. So far as concerns civil justice, it is pointless to speculate on possible Brexit outcomes and we shall deal with whatever emerges, determined to maintain and enhance the leading position of London and English Law internationally. Above all with Brexit, we must maintain perspective, so that it does not become an all-embracing single issue. We need to look beyond Brexit and ensure that this jurisdiction remains ahead of the curve in addressing the ever-increasing pace of technological change that will assuredly alter the way business is done. If Lord Mansfield could harness change, so must we.

Conclusion:

36. To recap: Civil Justice is a public good – a pillar of the rule of law. It is crucial to access to justice domestically, so shaping the society we are. It is qualitatively and financially an outstanding exemplar of the UK's soft power internationally. To maintain and improve our system, the only

touchstone for both Bench and Bar is excellence – and we should take whatever steps are necessary to meet this standard. Though the Commercial Court and the other Rolls Building jurisdictions are at the cutting edge, our focus must be system-wide. In Macauley’s terms, we must embrace reform – in substantive law, procedural law, technology and looking beyond Brexit – that we may preserve what is best in our system. It is, after all, the common law way – and, more especially, the right way in a time of change.