MASTER OF THE ROLLS

LORD CLARKE OF STONE-CUM-EBONY, MASTER OF THE ROLLS

ACCESS TO JUSTICE: HOPE SPRINGS ETERNAL

THE MARY WARD LEGAL ADVICE CENTRE ANNUAL LECTURE

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1. Good evening. It is a pleasure to be here tonight. I thought that I would talk tonight about access to justice; a subject that is as close to my heart as it is to yours. It is a great privilege to have been asked to deliver this lecture. As you have just heard the Mary Ward Legal Advice Centre is a great organisation, which deserves support from all sides. The four areas of social welfare law it focuses on, viz debt, employment, housing and welfare benefits are central to many people's lives. I could not possibly add to the brilliant advocacy of Margie Butler. I shall simply say that I agree with her wholeheartedly.

2. Before turning to access to justice, I thought it would be of interest to remember a number of things that have been said about justice through the ages. Before I do even that, it is only fair that I should come clean.

All the erudite and good bits of what I have to say were prepared by John Sorabji, who is a brilliant lawyer and academic, whereas all the boring bits and the mistakes are entirely mine.

3. My favourite starting point (or more accurately John's favourite starting point) is that attributed to Domitius Ulpianus, who is more commonly known as Ulpian. He was, of course, the most significant contributor to *Justinian's Institutes* and has recently been described by Professor Honoré as the pioneer of human rights.[1] An accolade indeed. And perhaps something else to add to the seemingly unending list of things, as Monty Python famously put it, that the Romans did for us. Ulpian was not just a major contributor to the *Institutes*, he was, or at least is widely believed to be, the author of its first line, in which justice is defined. Justice, Ulpian said, was "*the constant and perpetual wish to render everyone his due.*"[2] I doubt whether anyone can properly disagree with that.

4. From Ulpian in 533 BC we can travel across the centuries to Sir John Holt, Lord Chief Justice. In 1702 in *Ashby v White* he said this about the right to vote in his dissenting judgment – a dissent that was later upheld on appeal by the House of Lords:

   "*If the plaintiff has a right he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy for want of right and want of remedy are reciprocal.*"[3]

5. *Ibi jus ubi remedium* as the courts used to say when Latin was still in vogue. The language may have fallen out of favour since the Woolf Reforms, but it cannot be denied that the truth expressed by the claim that where there is a right there must be a remedy remains as valid today as it did in 1702. The truth expressed here is one that those interested in civil justice in

[1] Honoré, *Ulpian: pioneer of human rights*, (OUP) (2002).
[2] Thomas (ed), *Justinian's Institutes*, (Cornell University Press) (1987).
[3] (1702) 2 Ld Ray. 938, 92 ER 126.

general, and access to justice in particular, have long understood. It is a truth that Bentham, that great 19th Century philosopher and reformer, noted when he attacked what would soon become known as our, then, Dickensian civil justice system on the grounds that its inadequacies rendered '*talk of equality, rights, liberty and justice*' a chimera.[4] In the absence of a means to effect a remedy through which to enforce legal rights and obligations, the language of rights is meaningless. As our American cousins are known to say, talk is cheap.

6. Moving across the Atlantic it is, finally, helpful to recall what was said in the middle of the 20th Century by a great American jurist, for whom talk was never cheap. In 1956 Associate Supreme Court Justice Brennan said this about justice:

> "*'Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in the benefit of impartiality and fairness.*"[5]

7. Ulpian, Holt, Bentham and Brennan in different ways all express a profound truth about our justice and our society. It is a truth which calls to mind the Book of Judges. As you will I am sure remember, it describes the civil war between the Ephraimites and the Gileadites. The Gileadites easily defeated their foes and then took steps to stop the survivors fleeing. According to the Book of Judges, this is what then happened:

> "*The Gileadites captured the fords of the Jordan leading to Ephraim, and whenever a survivor of Ephraim said, "Let me cross over," the men of Gilead asked him, "Are you an*

[4] Mack, *Jeremy Bentham, An Odyssey of Ideas 1748 – 1792*, (Heinemann) (1962) at 86.
[5] Brennan, *The Community's Responsibility for Legal Aid*, Legal Aid Brief Case Vol. 15 (December 1956) at 75, cited in Napier, *Access to Justice: Keeping the Doors Open*, Gresham Lecture 2007 (http://www.gresham.ac.uk/event.asp?EventId=608&PageId=45)

Ephraimite?" If he replied, "No," they said, "All right, say 'Shibboleth.'" He said, "Sibboleth," because he could not pronounce the word correctly, they seized him and killed him at the fords of the Jordan. Forty-two thousand Ephraimites were killed at that time."[6]

8. It was by their ability, or inability, properly to pronounce 'shibboleth' that the survivors at the fords were known. It defined them in a profound way. It separated Ephraimite from Gileadite. What has this to do with access to justice in 21st Century England and Wales you may well ask? It seems to me that it tells us something profound about our commitment to justice, to access to justice. It does so because it raises the question - to my mind at least - what would define us if we were to stand at the fords of the river Jordan. What would our shibboleth be?

9. For Ulpian and others the answer to that question is easy: it would be a firm and unyielding commitment to justice, to access to justice. That commitment would mark them out. It would define them. It would do so because it would demonstrate that they were committed to a society where the rule of law means more than a sound bite for rolling twenty four hour television news. It would demonstrate that they believed that society should be so organised that there were not simply just substantive laws, whether they be private law, family law, criminal law, human rights law, housing and other aspects of public law, or even, if such is possible (and I understand views will differ on this) tax law. It would demonstrate that in addition to a just substantive law there was a just and effective body of procedural law to give effect to substantive rights. It would also demonstrate that there is an adequate and effective machinery, whereby, as Neil Andrews of Cambridge University has rightly put it, the mere assertions of law are '*translated into binding determinations . . .*'[7]

[6] The Old Testament, Book of Judges at 12.4.
[7] Andrews, *English Civil Procedure*, (OUP) (2003) at 15.

10. The shibboleth that Ulpian et al would have enunciated proudly would have been an unswerving commitment to a society governed by the rule of law, where justice was available to all through the provision of just laws and through their application in a just, impartial and effective justice system. The question for us is whether, if we were tested at the River Jordan, we would pass the test. Would we say, could we properly pronounce, what might be called Ulpian's shibboleth?

11. It is of course true to say that we live in an open, liberal democracy committed to the rule of law. This has long been accepted as true - not only as a consequence of the Bill of Rights 1688, the Act of Settlement 1701 and the Great Reform Act 1832, but also through various reforms in the 19th and 20th centuries and, most recently, the Constitutional Reform Act 2005 and the Legal Services Act 2007. These last two Acts, by section 1(a) and section 1(1)(b) respectively make explicit what was implicit in those other, historical, reforms. That is our commitment to the constitutional principle of the rule of law. That is an important, indeed an essential, starting point. But what more do we need before we can stand safely at the ford and answer the question? The answer to that was to my mind recently suggested by what Lord Bingham said about the rule of law in 2006. He said this:

> "*The core of the . . . principle [of the rule of law] is, I suggest, that all persons and authorities within the state, public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.*"[8]

12. It is not sufficient therefore to announce our commitment, either implicitly or explicitly, to the rule of law. We must have the means by which that principle can be given proper effect. It calls for proper democratic institutions.

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[8] Lord Bingham, *The Rule of Law*, 6th David Williams Annual Lecture, Centre for Public Law, Cambridge University (http://cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php).

It calls for just laws promulgated by those institutions. It calls for a justice system which can give effect to those laws. All of you here tonight are, I imagine, involved in our justice system in some way or another. You might be solicitors, barristers or legal executives. You might be judges. You might work in city firms, high street firms, in-house, in chambers or in advice bureaux. I imagine that you have all have at some time provided pro bono advice and assistance, either for the Mary Ward Legal Advice Centre or other such Advice Centres, if, which I doubt, there is any legal advice centre to compare with Mary Ward. I am confident that you will all continue to provide advice and assistance in the future.

13. In doing so, I am sure that you will in different ways, and no doubt to differing degrees, help those who have been described, in the jargon espoused by some (not me), as the customers of the justice system. It is to my mind difficult to imagine a more inappropriate phrase to describe users of the criminal and family justice aspects of our justice system.

14. It seems to me that we may well now be (and have perhaps for some time been) in the process of undermining the efficacy of our justice system. First, there is now an idea abroad that we have not one but three justice systems, each of which can be treated separately depending on their perceived importance. For example, we used to have a single Supreme Court of Judicature for England and Wales. It contained the High Court, the Crown Court and the Court of Appeal. The Constitutional Reform Act 2005 changed that. It was, ostensibly thought too confusing to have both a Supreme Court for England and Wales and a Supreme Court of the United Kingdom. Although I note that other countries, such as the United States, do not seem to find such similarities between State Supreme Courts and the US Supreme Court confusing. In any event, as section 59 of the 2005 Act tells us, the former had to change its name.

It did so however, not be the simple device of perhaps renaming it the Court of Justice for England and Wales, but by renaming it the Senior Courts of England and Wales. What's in a name you might say? Well, note the plural. We have moved from a single Supreme Court to three, independent, senior courts. One of those, the Crown Court, deals with criminal justice. The other, the High Court, deals with family and civil justice. So too do the County Courts. The Court of Appeal in its two Divisions deals with all three aspects of justice.

15. Splitting the single Supreme Court into three in this way fits neatly into the differential treatment the three aspects of justice receive. It is often said that civil justice, including family justice, is the poor relation to criminal justice. If there is any public money the vast majority goes to crime, a small amount then goes to family and a minute proportion goes to civil. This can clearly be seen from the government's recent consultation on civil legal aid. In this regard Sir Andrew Morritt, who is of course the Chancellor of the High Court has recently said this at a public seminar held by Sir Rupert Jackson in connection with his costs' review:

> "*1. "Justice, like the Ritz, is open to all". Whether this cynical aphorism is correctly attributed to Mathew LJ at the end of the C19th or to Horne Tooke at the beginning matters little when compared to the distressing fact that the bitter sarcasm behind the statement is even more obvious now than it was then. Notwithstanding many and varied efforts over the last hundred years or so on a number of different fronts the burden of costs is too great for most people to contemplate. It follows that those who are wronged may be denied any effective remedy and those who are sued without sufficient cause may be unable properly to defend themselves. Consequently the attraction of extra-judicial remedies increases.*
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> *2. This ought to engage the urgent attention of the government of any democratic state. Sadly the only attention it has attracted from ours, at least so far, is the practical removal of civil legal aid and a policy of full cost recovery under which there have been substantial increases in court fees payable by all not already on benefit of some kind or other. Indeed in the Response to Consultation on Civil Court Fees published last week the Ministry of Justice observed, somewhat peevishly, that though not asked to do so 19 out of 52 responses commented unfavourably on that policy. The Ministry added:*

"The civil and family courts are principally concerned with resolving private disputes between individuals or companies. These are not criminal cases. Therefore it is not right for the taxpayer at large to continue to provide a general untargeted subsidy for resolution of these disputes in courts."

The use of the word "therefore" suggests that the Ministry considers that expressions such as 'the rule of law' and 'justice according to law' are, in each case, limited to the criminal law. If so, it is a dangerous and fallacious view."[9]

16. As they say in the Court of Appeal, I entirely agree. The fundamental point that Sir Andrew makes here is that it is grossly inaccurate, or put another way, an utter misconception, to perceive civil and family justice as some form of optional extra that should be given, at best, no more than a begrudging subsidy. This misconception can the more easily take hold, if we treat the three aspects of the system as operating in sealed compartments wholly unrelated to each other.

17. Equally, it is easier for that misconception to take hold when, as is increasingly the case, the language of the consumer sector is applied to the justice system. That language can most clearly be seen in the report into the civil justice system to the Lord Chancellor, written by Sir Peter Middleton in 1997. He said this:

"*Justice – by which I mean the satisfactory resolution of disputes – is part of the service sector of the economy. As the economy matures and as wealth and income grow, the overall trend will be for people to want and be willing to pay for more justice.*"[10]

This view is one that has most recently been echoed by Professor Zuckerman, when he noted how the civil justice system must be as efficient as possible in order to justify the limited resources made available to it by the state.

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[9] Morritt C, *Costs Seminar*, (03 July 2009) (Manchester University) (http://www.judiciary.gov.uk/docs/costs-review/speech-chancellor-high-court.pdf).

[10] Middleton, *Report to the Lord Chancellor*, (HMSO) (1997) (http://www.dca.gov.uk/civil/reportfr.htm) at 10 – 11.

It had to do so because like all other public services there was no entitlement to the best possible system supplied with an eye to money being no object.[11]

18. There is of course truth in what both Middleton and Zuckerman say. No justice system can expect unlimited largesse from the State. Equally, it is true to say that the provision of a justice system is a public service provided by the State. It is not however an optional public service. It is not akin to the NHS for instance. We can all conceive of the possibility, whether we agree with it or not, that the NHS could be entirely privatised. There is no reason why a state must provide a universal health care system. Some states do not. Others do.

19. What is profoundly wrong with statements such as Middleton's, and that of the Ministry of Justice's response to the critical responses to its own consultation on civil legal aid, is the idea inherent in them, that the civil and family justice systems are optional extras, which it is an unjustifiable and unnecessary burden for the general taxpayer to fund. Let me be clear I am not suggesting that the taxpayer should be expected to provide a blank cheque. But I am suggesting that the State should properly understand that properly funding the civil and family justice systems is as essential a part of a society committed to the rule of law and to open democratic ideals, as is properly funding the criminal justice system. It is essential in this way because the three systems are in fact no more than three facets of an indivisible whole and it is that whole that is or should be the living embodiment of our commitment to the rule of law. It is Ulpian's shibboleth. It is, we hope, our shibboleth.

20. The further we move away from the proper funding of all facets of our justice system, the more we move away from that shibboleth and safety at the fords of the river Jordan.

[11] Zuckerman, *Civil Litigation: A Public Service for the Enforcement of Civil Rights*, (2007) (26) Civil Justice Quarterly 1 at [3].

But what of the claim that the civil and family justice system simply provide the means to resolve private disputes? If this is the case how, it might be asked can it properly be equated with the criminal justice system? There are to my mind at least two answers to this.

21. The first is utterly obvious. Neither the civil nor the family justice system exists simply to resolve private disputes. Neither of these facets of the justice system exist simply to deliver services to customers. On the contrary, they both exist to determine rights, which include rights and obligations as between the individual and the state. They do exactly what the criminal justice system does, when it determines guilt or innocence. In the family courts decisions are taken, for example, in respect of care applications brought by local authorities. Should the court authorise taking a child into care or requiring its adoption on the state's application? In the civil courts judicial review proceedings resolve disputes between individuals and the state, whether those proceedings arise out of planning applications made by local or central authorities, whether they arise from administrative decisions by local or central authorities, housing applications, social security claims, welfare rights and so on. In all three types of case, criminal, family and civil, the court routinely adjudicate on rights, duties and obligations as between individuals and the state. If this is a service in the Middleton sense, it is a service of which society as a whole is a consumer. It is because it enables society, as Jack Jacob put it, to assert the primacy of law and to secure the rule of law.[12] Some service. At the last count there were around 50 million consumers of this service in England and Wales.[13]

[12] Jacob, *The Fabric of English Civil Justice*, (Stevens & Co) (1987) at 63.
[13] National Statistics, 2001 Census (http://www.statistics.gov.uk/census2001/profiles/64.asp).

22. The second reason is perhaps not so obvious. Even in those classes of case which can properly be said to involve the determination of rights and obligations as between private individuals, there is a public aspect to those cases on a par with the public role of the criminal courts. First, private claims serve two purposes. On the one hand, they decide rights and obligations as between the parties. Determining the construction of a contractual clause to determine whether there has been an actionable breach of contract is not akin to the determination of innocence or guilt in a trial for murder, or even assault. Looked at from the perspective of the private interest in determining such a civil claim, there is no equivalent public purpose. But, the private interest is not the only interest that arises in civil claims between private individuals. There is a clear public interest in determining such disputes.

23. The first aspect of that public interest is that judicial determinations of such private claims can clarify and develop the law. Without, for instance, *Donoghue v Stevenson* [1932] AC 562, a dispute between a ginger beer vendor and the consumer of the ginger beer about the alleged contamination of the ginger beer by a nail, we might not now have a well-developed law of negligence. (I note in passing that it was never discovered whether there was in fact a snail because the case settled on the facts after the decision in the House of Lords.) The development and clarification of the law through judicial decisions, whether they be in the civil courts, or in the family courts as the recent Court of Appeal decision in *Radmacher (formerly Granatino) v Granatino* [2009] EWC Civ 649 which altered the status in English law of pre-nuptial agreements, serves a clear public role; a role central to the proper implementation of the rule of law.

24. The second aspect of the public interest that arises from the resolution of private disputes through the civil and family courts was hinted out by Sir Andrew Morritt when he stated that the approach articulated in the Ministry of Justice's response was 'dangerous'.

It is dangerous because if the family and civil justice systems were inadequate to the task of determining such disputes fairly, impartially and at a cost that litigants could afford, those litigants might lose such confidence in them that they would resort to self-help. Resort to self-help could take a benign form. It could, however, also take anything but a benign form. It could see the law not being applied by court decisions but through violence and the threat of violence. Down that path lies an increase in crime with the consequent use of the criminal justice system. What purpose, we could ask, would diverting civil and family disputes to the criminal justice system in this way possibly serve? To my mind it would only serve to undermine the fabric of our society and our commitment to the rule of law.

25. So far as civil disputes are concerned, many of those who need legal advice have multiple problems. These may include mental health problems, housing problems and family problems. We often hear of advice deserts. Every effort should be made to avoid such deserts. This involves ensuring that expert advice in each of these areas, hopefully in circumstances in which it is possible for someone to have regard to all the problems facing the client. This in turn involves sufficient funding of them. Without it the problems of society are like to get worse.

26. It seems to me that there are no good reasons for treating the family and civil justice systems as something entirely different from the criminal justice system. In truth they are simply interconnected facets of the same thing – that is the practical implementation of commitment to the rule of law. In the absence of a properly funded and readily accessible justice system, taken as a whole, it seems to me that our presence at the River Jordan would be a perilous one.

27. As pressure on public funding becomes greater rather than less, we will depend more and more on the work done by the Mary Ward Legal Advice Centre and those who support it. Pro bono legal advice and assistance has a long provenance in English law. It was first recognised officially in 1494, when the first statute was passed during Henry VII's time that required the Lord Chancellor to assign counsel and attorneys to, in the words of the statute, '*every poor person*.'[14] Now it is not just the poor who have need to call on the assistance of pro bono legal advice centres. The call on this and other such centres, is increasing. The road from 1494 has been a long one and one for which the end is not yet in sight. It is a road which in 1900 saw this centre open through the, then, *Poor Man's Lawyer Service*. I am sure that it will be a road that we will still be walking in 2100, when this centre marks its bicentennial.

28. Perhaps I may add in parenthesis that earlier this week I went to the University of Kent, which now provides something called the Canterbury Law Clinic which uses both lawyers and volunteers which include both students and others to meet the needs of the local community.

29. That the Mary Ward Centre and those like it continue to provide the support for those who need legal advice and assistance but who cannot afford to pay for it to my mind says something profoundly positive about our society. It says to me that there remain those in society who are committed to ensuring that, irrespective of an individual's ability to pay, there should be available to them, as Holt CJ put it, the means by which they can vindicate their rights. It says to me, as Brennan put it, that the threat to democracy's very life is one which we remain capable of keeping yet at bay through ensuring that those who need to, but cannot afford to pay to do so, can access the machinery of justice.

[14] Henry VII c.12 1494

It says to me there are those in society who still subscribe to Ulpian's belief in the commitment to rendering everyone his due.

30. It says to me, and this is something that all members of society should take careful note of, that we as a society have not yet rendered justice a '*doubtful luxury*'. We should take care not to do so or we will lose our ability to pronounce Ulpian's shibboleth; we will lose what it is that makes us members of a society committed to the rule of law and our chances of safely fording the river will diminish fatally. We should take care therefore to ensure that all aspects of our justice system are properly funded and able to deliver effective access to justice, to deliver justice, to all. As Pope put it, *Hope springs eternal in the human breast*.[15] Where access to justice is concerned we must transform that hope into reality. I wish Mary Ward every success in the future and profoundly hope that it will continue to receive public (and private) funding to that end.

[15] Pope, *An Essay on Man*.