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A VIEW ACROSS THE SYSTEM

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Introduction[1]

1. It is a pleasure to be here this evening to deliver the LCLCBA's annual lecture. It is some time now since I was the chairman of the Association and I am glad to see that under the chairmanship of Michael Kent QC it continues to go from strength to strength. The role played in the development of the profession, and the interests of their members, of specialist Bar Associations, such as the LCLCBA is of immense importance and will continue to be so. I should emphasise that the views I express are my own; I do not purport to speak for the judiciary more generally.

2. I thought that I would start tonight's talk with a quotation and a question. First the quotation. It is from Lord Denning MR's judgment in *The Atlantic Star* from 1973. He said this,

> '*No one who comes to these courts asking for justice should come in vain. . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England,*

[1] I wish to thank John Sorabji for all his help in preparing this lecture.

> *it is a good place to shop in, both for the quality of the goods and the speed of service*'.[2]

3. However, my purpose tonight is not to discuss forum shopping. That is a lecture for another day. Lord Denning's remark does however draw me to my question: is England and Wales still a good place to shop in? Is it still as good a place to seek justice as it was in 1973? Is it better or worse? Do we still have high quality legal goods and services to sell? And, what of the future? Perhaps that amounts to two questions; one concerning the present state of the justice system and another as to its future. But that matters not.

4. A lot has, of course, changed since Lord Denning's day; and in some ways radically. A few short examples can highlight the extent of those changes. First, the judiciary. In Lord Denning's day judges were very much, in the famous phrase, 'passive umpires' – though it could certainly be said that some of that passivity was expressed in a distinctly lively and peppery fashion. I suspect it is the conceit of every generation of the Judges that the ogres are all in the past and that we are, today, models of reasonableness. Case management, however, lay in the future, a duty now firmly established in the CPR. Many judges will soon be actively managing costs too, when the Jackson reforms are implemented.

5. Equally, judges historically had little to do with managing the judicial system: that was something done by the Lord Chancellor. That all ended in 2005 with the Constitutional Reform Act, when the Lord Chancellor's office and role were dramatically altered. The Lord Chief Justice became head of the judiciary in England and Wales and gained responsibility for a significant number of administrative and managerial responsibilities previously carried out by the Lord Chancellor.

[2] *The Atlantic Star* [1973] QB 364 at 381 – 382.

6. Change has not been confined to the judiciary. Over the last decades the legal profession has undergone profound change. Not long ago it was regulated by the Law Society and the Bar Council. Low cost, practical self-regulation was the order of the day, reinforced by a very strong or tight professional ethos – and subject, as it might today be termed, to overarching regulation by the judicial branch of the State: the Law Society was subject to oversight from the Master of the Rolls, who approved its rules and regulations and the Bar Council regulated under delegated authority from the judiciary.

7. Since 2007 the regulatory landscape has changed.[3] The Law Society and Bar Council have had to separate their regulatory and representative functions. They are now only frontline regulators, and only two out of a number of such regulators, subject to the overarching regulation by the Legal Services Board. We have moved from relatively straightforward regulation to what might be described as a more complex, more expensive regulatory landscape.

8. 2007's Legal Services Act did not just effect changes to regulatory structure. The nature of practice has changed and is undergoing profound change. For example, there is today the prospect of barristers working in partnerships with each other and of non-lawyers investing in law firms. It is a world Lord Denning would barely recognise.

9. Regulation and the structure of the profession are not the only areas to have undergone reform. In Lord Denning's day the doctrines of champerty and maintenance still held sway as they had done for centuries. Now we have third party funding of litigation and, I understand, a self-regulating Association of Litigation Funders.[4] Equally once unethical and illegal contingency fees are now permitted. Conditional fee agreements, introduced by the Courts and Legal Services Act 1990, a form of contingency agreement are soon to

[3] Legal Services Act 2007.
[4] <http://associationoflitigationfunders.com/>.

enter their fourth incarnation.[5] Next year damages-based agreements, more akin to US-style contingency fees, enter the picture.

10. That is just a pencil sketch of some of the changes with which we are all familiar. They are changes which have altered the legal landscape. The pace of change is unlikely to slow. With that in mind I want to examine the questions I raised earlier. I want to examine the question whether England and Wales is still, and will continue to be, a good forum to shop in, a good forum to seek and obtain justice. I want to do so by considering some of the challenges the justice system is facing and is likely to face. In particular I want to focus on giving a view across the system through an examination of five broad guiding principles: (1) the public interest; (2) integrity; (3) excellence; (4) efficiency; and (5) taking a long term view. In doing so, I shall ask you to range outside of your own specialist area/s, as my focus is on our system as a whole. As it seems to me, it is only by focusing on these principles that we can navigate our legal system through the challenges that lie ahead, preserving its strengths domestically and maintaining its pre-eminent role internationally. No system can survive if it is too inflexible to accommodate change; but babies and bath water need to be kept in mind.

(i) The Public Interest

11. If I am right so far, we must anticipate a further period of change. It is also self-evident that we are faced with financial pressures it would seem for years to come. Those pressures apply to sectors of the profession – consider the position of the criminal bar currently. They also apply to funds available for running the courts. What should be our stance in adapting to change and in seeking to cope, doing more with and for less?
12. To my mind, there is only one proper and tenable touchstone: the public interest. Whether it is a matter of preserving the practices of the Bar or the prerogatives of the

[5] (1) Conditional Fee Agreements Order 1995; (2) Conditional Fee Agreements Order 2000; (3) Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003; (4) the draft Conditional Fee Agreements Order 2012.

Bench, the justification must be defensible in terms of the public interest. We need, for instance, a sufficient number of Judges, not to provide judicial office for those who wish to be Judges but because we need enough Judges to deal with the workload and anticipated workload without unacceptable delay. While we welcome and seek to accommodate part time working where we can, ultimately the business need of running the Courts must come first. Provider self interest is best avoided; the justification for the particular position enjoyed by Bar and Bench in our society must and, in my view, can readily be justified in the public interest – although it is always necessary to bear in mind the unique constitutional role and responsibilities of the judiciary; we are not simply another public service.

13. What features of our system are in the public interest? For tonight's purposes, may I single out three – without for a moment suggesting that this is a closed list. If, however, we do focus on these three, we will have gone a long way to preserving the essence of our system, even when faced with pressures of the sort I have already indicated.

14. First, the *rule of law*. The question of definition could alone warrant a thesis but I am content, with respect, to adopt as a working definition, Lord Bingham's summary, in *The Rule of Law* (2010), at p.8:

> "The core of the existing principle is....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. This statement....is not comprehensive, and even the most ardent constitutionalist would not suggest that it could be universally applied without exception or qualification."

15. The "core of the principle" is thus apparent. It is not weakened by inevitable qualifications. So, for instance, we are committed to public or open justice. In cases

ranging from *Scott v Scott* [1913] AC 417 to *In re Trinity Mirror plc* [2008] EWCA Crim 50; [2008] QB 770, this principle has been emphasised and vigorously so. Open justice is a fundamentally important means by which we, as a society, ensure that justice is done; in a sense, it is a matter of accountability. It is with this principle in mind that the judiciary is now engaged in discussions as to the possible broadcasting of certain proceedings in the Court of Appeal, including both civil appeals and the CACD. Inevitably, here, we need to balance the demands of open justice and the need to avoid interference with the interests of justice. More generally, sensible qualifications are unavoidable and do not weaken the principle. Thus, for example, it would be futile to grant protection for trade secrets if the secrets are lost in open court proceedings. A victim of blackmail and, as the Art. 8, ECHR jurisprudence suggests, a variety of others may have a legitimate interest in the protection of their privacy. The needs of national security may likewise require certain inroads on the principle. As famously observed by Justice Oliver Wendell Holmes in *The Common Law, (1882)*, at p.1: "The life of the law has not been logic: it has been experience." The genius of the common law it might be remarked is not to push theory to breaking point. What is important, however, is that all such qualifications should require, as Lord Bingham said (*ibid*) "close consideration and clear justification".

16. Secondly, an *independent judiciary*. I hope and have no doubt that this proposition is regarded as axiomatic. But every so often, at a practical level it is necessary to sound a reminder. Take Police and Crime Commissioners ("PCC"). It is not for the judiciary to express a view, one way or another, on the wisdom of the policy introducing PCCs; that is the prerogative of Government. But it is for the judiciary, while hopefully enjoying a good arm's length working relationship with PCCs, to mark out clear demarcation lines. It is, for example, <u>not</u> for a PCC to seek to intrude upon, influence or comment upon sentencing in individual cases before the Courts. In the same context, the reciprocal statutory duty of cooperation on PCCs and others in the criminal justice area does not

extend to judicial office-holders; the limits are thus drawn, entirely deliberately, to delineate the boundaries of judicial independence.

17. Thirdly, an *independent Bar of quality*. An independent Bar guarantees the fearless representation of those who most need it; as with an independent judiciary, it is difficult to conceive of the survival of the rule of law, without an independent Bar. The judiciary does not, however, have a *locus* to enter into disputes as to the distribution of work between barristers, solicitors or in-house lawyers. Nor is it for the judiciary to become involved in what might be termed remuneration disputes as such between publicly funded lawyers and those footing the bill. The judiciary does, however, have a vital and continuing interest in the quality of advocacy and may, from time to time, feel compelled to speak out insofar as quality is threatened. The QASA scheme (Quality Assurance Scheme for Advocates, in the criminal sphere) may be seen as a facet of this concern.

(ii) Integrity

18. Integrity. Integrity has been a byword for the English legal system. It is fundamental to the rule of law domestically and to our pre-eminent status internationally. Without it, we are lost. We should not, however, take it for granted, perhaps all the more so in an anti-professional age.

19. So far as concerns the judiciary, we thankfully regard integrity as a given and corruption as inconceivable. But we cannot be complacent. We will need to remain vigilant, maintaining a constant focus on this indispensable part of our ethos.

20. We have also required the highest standards of probity from our legal profession, both solicitors and barristers.[6] Furthermore, trust between Bench and Bar has been a hallmark of our system. The knowledge that one will not be misled, permits judicial business to be conducted with an ease and expedition that would not otherwise be present. It is founded on tradition and on the knowledge that an advocate's duty to the Court ranks ahead even of the demands of his client. (For the avoidance of doubt, such a duty does not at all conflict with the advocate's duty fearlessly to represent his client.) I flag this point because we face the prospect of a variety of legal structures to come, including the prospect of outside investment. It is no part of the judiciary's function to oppose innovation simply because it is new; but it is not inappropriate to sound a warning against any erosion of the advocate's duty to the court. I am anxious to ensure that a conflict between shareholder value or business interest on the one hand and professional ethics should always be resolved in favour of the latter – and the point is worth making because the pressures to the contrary can arise in subtle form through small, imperceptible steps. There is of course the further matter to which I can only allude – namely, that the more innovative we are with the delivery of professional services, the greater the likely burden of regulation, a matter replete with it its own difficulties.

(iii) Excellence

21. This third principle – excellence - likewise admits of no compromise. Internationally, in the private sector, it comes next to integrity.

22. Excellence explains why companies and individuals from all over the world choose (a word I underline) to resolve their disputes in London, so generating (as is well known) very significant sums by way of invisible exports: the contribution which the legal

[6] See, e.g., *Bolton v The Law Society* [1994] 1 WLR 512, *per* Sir Thomas Bingham MR (as he then was), at pp. 518-519.

profession makes to GDP: £23.1 Billion in 2009/2010, representing 1.8% of GDP.[7] The Rolls Building represents a national commitment to appropriate facilities, supporting the services offered by the specialist courts located there.

23. The market for international dispute resolution is, however, intensely competitive. London has no pre-ordained right to retain its pre-eminence and the Commercial Court (and other specialist courts) are central to our reputation in this market. It follows that, very high on any "Risk Register" (an expression much beloved in the public sector, though this one may have meaning for the private sector as well), is maintaining the quality of the judiciary. That depends on ensuring that the judiciary remains an attractive option for the most successful practitioners, in accordance with our long-standing (and much envied) traditions. Complacency or carelessness in this regard would be culpable. It also goes without saying that what weakens the profession today weakens the judiciary tomorrow. We must guard against that too.

24. So much for the specialist Bar and Courts; but I have never thought that they can endure as an island of excellence, were they to be surrounded by a system on the slide. It is therefore necessary to focus on excellence across the board; our aim must be no less, as my colleague Rafferty LJ urged recently at the Bar Conference.

25. Here, there are undoubtedly concerns. First, the position of Government (any Government) is not easy. Money is in short supply; that is a reality. There are many priorities and supplicants for public funds. That too is understood. However, reducing cost (in the sense of tightening the legal aid budget) must, over time, impact on the willingness of the best and brightest to practise at the publicly funded Bar. What will this do to the quality of our justice system over time, in areas such as crime and family?

[7] Report by TheCityUK (2011) cited in Legal Futures <http://www.legalfutures.co.uk/legal-services-act/market-monitor/value-of-legal-market-continues-to-rise-despite-fall-in-fees-at-biggest-firms>.

Secondly, staying with the criminal justice system, it is of the first importance to underline that the system needs to be viewed as a whole: counsel, Judges and the Courts are but one part of it. If other participants have weaknesses or difficulties, necessarily delays or worse will result. Thirdly, as another of my colleagues recently observed, Government has two praiseworthy goals – reducing cost and reducing delay. But these goals do not necessarily work together. To the extent that we see an increase in the number of LIPS, there is a very real risk of increasing delay, so, in part at least, negating any savings from a reduction in legal representation available by way of legal aid. I say nothing of the quality of justice it is possible to achieve when one (or both) parties represent themselves. Fourthly, over recent years there has been much emphasis on "rights", perhaps (some might say) too little on duties. Be that as it may. We are in danger of encouraging the assertion of rights while not having the resources to permit their proper exercise. Something may have to give.

26. A word of caution which I think I must add. We must cling to excellence across the legal system generally and whatever the pressures. We cannot afford not to do so. But it would be too simplistic to say that all good advocacy comes from the Bar and all shortcomings in advocacy come from others. I fear, in my experience at least, that is simply not so. There is a challenge for the leadership of the Bar which must maintain its standing as the advocacy profession of excellence.

(iv) Efficiency

27. I turn to efficiency. Its importance is at once apparent. First, in the private sector of international dispute resolution, efficiency is essential – otherwise business will be lost because we are simply too expensive. We do not want to price ourselves out of the market, a point successive Commercial Court Judges have repeatedly emphasised.

Secondly, in the publicly funded areas, protest as to a lack of resources is blunted if we do not use those we have efficiently.

28. Considerations of this nature have resulted in a striking increase in the management role of the judiciary – both in and out of Court. In court, the doctrine of case management is by now well established. To me, its justification is obvious. It focuses on the early identification of the real issues in dispute. It is a different art in civil and criminal cases but the underlying principles are the same. My experience at the Bar was the Commercial Court;[8] there, much assisted by the fact that Judges did their own interlocutories, case management was the norm long before the term was coined. Anyone appearing before Donaldson J (as he then was) or a good number of his successors, needed to have a very clear and quick grasp of the issues in the case. In criminal cases, the concept is no less valid but the exercise is more complex because the range of sanctions is necessarily rather more limited – the remedy of strike out, tempting though it some times is to invoke it, can be difficult to deploy in a criminal case. Case management of course comes at a price; there is a need for judicial time, undertaking advance reading and preparation rather different from that which faced many previous generations of Judges. Take disclosure for instance, one of the principal concerns in both civil and criminal cases: robust judicial case management is a must but it cannot be done if the necessary time is not available. Overall, case management is and must be a priority: by controlling cost and time, judicial case management facilitates justice.

29. There are many fictions as to judicial life; one is that Judges do nothing other than sit in Court. The reality is otherwise. Out of court, the management and leadership roles of the judiciary have expanded beyond recognition. This creates a dilemma for the judiciary, involving the need to balance managerial and leadership duties with its primary role of dispensing justice in court. This is particularly acute where the senior judiciary are

[8] Including for these purposes the Admiralty Court.

concerned. The downside of this expansion is less time to sit in Court. But if we did not undertake such duties, they would be done by others and we would very likely find ourselves with consequences of which we did not approve. I therefore see a continued need for striking a balance between our roles, no decrease in our management responsibilities – and, looked at positively, the opportunity to bring judicial perspective to bear in maximising the efficiency of the system, even as we battle with resource constraints.

30. A word as to some perhaps more substantive concerns in the context of efficiency, if only to provoke thought and debate.

(i) Expert witnesses (a topic recently addressed by the SPJ). Does our system, or some parts of it, over-use expert witnesses? In some areas, are they an expensive substitute for thinking our way through essentially factual rather than expert issues?

(ii) Are the interests of finality receiving appropriate recognition in some areas of judicial review and related challenges? Has the balance been correctly struck? What percentage of our legal aid budget goes on unmeritorious challenges in certain public law areas?

(iii) Is Art. 8, ECHR in danger of becoming the contemporary public law equivalent of *Panchaud Freres v ET General Grain Co.* [1970] 1 Lloyd's Rep 53? That was a decision suggesting a remarkably loose species of estoppel, thereafter much relied upon in commercial cases, in support of supposed "merits" arguments, almost always when the party concerned did not have good grounds for resisting the claim – and generally unsuccessfully!

(iv) Are we in danger of gravely weakening administrative decision-making by "over-judicialisation", a thought prompted by Lord Hope's graphic phrase concerning the need to avoid the "emasculation by over-judicialisation of administrative

welfare schemes": *Ali v Birmingham City Council* [2010] UKSC 8; [2010] 2 AC 39, at [55]. If we are, what are the consequences for public administration?

31. I flag these points because it is incumbent on us – practitioners and Judges alike – to insist on efficiency throughout our system, to reiterate, so as to protect our competitive position internationally and to obtain the most from limited resources domestically. In the same vein by doing our best to implement reforms (such as Jackson or those concerning Family Justice), then by reducing costs and increasing efficiency in the system, we will be improving the quality of justice.

(v) Taking a long-term view

32. My final principle is that in navigating some distinctly choppy waters, we need to keep our eyes clearly on the long-term future of the justice system. Our concern lies not with today's headlines; instead, when we consider the justice system and the role it plays in our society we cannot properly do that unless we take a long term perspective. We need to consider the long term effects of decisions we make now. The short-term effect of reforms may be beneficial – in the short term. But what is their long term effect? We need throughout to be alert to the potential unintended consequences of our actions.

33. Let me take three very different examples.

    (i) First, the funding of litigation, a matter upon which I have already touched. There is little doubt that removing prohibitions on funding arrangements will tend (at least in the short-term) to improve access to justice: consider conditional fee agreements. But what of the long term effects on the culture of litigation and the burden of regulation?

    (ii) Secondly, if or when it is necessary to give effect to budget cuts, how best do we avoid the danger of making short term economies which produce longer term damage to the justice system?

(iii) Thirdly, has the European Court of Human Rights ("the Strasbourg Court") over-reached itself as to the national application of rights that are universal at the level of abstraction?[9] In the short term, the temptation to intervene can readily expand the Court's reach; but what of the longer term standing of that Court?

A serving Judge should almost certainly not answer these questions – at least the first and third - but they are raised to remind us of the need to be mindful of the long term.

Conclusion

34. At the start of tonight's lecture I said I wanted to consider whether England and Wales was still a good forum to shop in? I think it is.

35. Our legal profession remains ethical and committed to excellence. So does our judiciary. I do not think we should be downhearted. To maintain a sense of perspective, it is perhaps worth reminding ourselves that 70 years ago the Battle of Stalingrad was raging. We do need, however, to remain vigilant. We face competitive pressures internationally and obvious constraints domestically. Some reforms, however well meant, have the potential to generate unintended adverse long term consequences. In coping with our difficulties and in confronting the challenges which undoubtedly lie ahead, it seems to me that the five principles highlighted tonight provide sure guides: to recap - the public interest, integrity, excellence, efficiency and a focus on the long-term. The effort will be worthwhile. What is at stake is no less than the enduring future of our justice system, one of this country's strongest assets, whether considered in terms of values or trade.

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[9] Lord Hoffmann, *The Universality of Human Rights* (JSB Lecture 2009).