

World Bar Conference 2016

Keynote closing address to the International Council of Advocates and Barristers

Lord Neuberger, President of The Supreme Court

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1. It is very good to be in Edinburgh this morning. As those of you who are not from the United Kingdom may or may not know, the UK Supreme Court is almost the only court with a UK-wide jurisdiction, as Scotland and Northern Ireland have their own legal and judicial systems, which are separate from those of England and Wales. Like so many UK institutions, the Supreme Court is based in London, and a visit to Edinburgh is therefore a particular pleasure. Not only is it one of the great cities of the world, but as a UK judge I can take a sort of vicarious pride in the fact that it has, and long has had, an impressive judiciary and advocacy profession.
2. Advocates enjoy exclusive rights to represent litigants in court, they are accorded a status in society, and, at least in some fields of law, they have the opportunity to earn quite large sums of money. And there is a reason for this. The reason that independent advocates have, and expect to have, such special privileges is not because they are wonderful people – although some of them may be, and at least one of them was when I was in practice as a barrister in England and Wales. No; the reason that independent advocates have privileges is because of the fundamental importance of having independent advocates in a modern civilised, democratic society – and above all a society run in accordance with the rule of law.

3. An honest, expert, respected, and independent judiciary is now generally accepted as being an essential ingredient of the rule of law, which is one of the two main constitutional pillars of a properly ethical and commercially successful society (the other pillar being democratic government). And it is not of course just of national importance: in an increasingly globalised world, the rule of law has a vital international dimension.
4. What is perhaps less appreciated, at least by the world outside that of legal specialists, is the equal constitutional importance to the rule of law of honest, expert, respected and independent lawyers. Both the moral and the economic aspects rule of law involves people having rights and duties, and it is wrong in principle and unfair in practice to give them rights, and to impose duties on them, unless those rights and duties can be enforced and ruled on by independent judges. It is just as wrong and undermining to give people rights and impose duties on them if they cannot get appropriate advice as to the existence and extent of such rights and duties, and cannot get proper representation in courts to fight for their rights or to defend themselves against claims.
5. And in a world where the laws conferring rights and imposing duties are increasing both in quantity and in complexity, the need for expert impartial advice and representation is greater than it ever has been. And it is not only for ordinary people that expert lawyers are needed. We judges need the assistance of expert lawyers too. The increasing complexity of the law means that judges have to depend on high quality advocates to direct them to the relevant legislative provisions and case law, and to ensure that all the arguments which can properly be advanced are put before the court.
6. The relationship between the judges and professional lawyers, perhaps especially advocates, is therefore very important. The relationship should be one of mutual

respect, trust and understanding, coupled with a suitable sense of distance and detachment. I believe that the system that it exists in the countries represented here today, Zimbabwe, Wales, South Africa, Scotland, Northern Ireland, New Zealand, Namibia, Ireland, Hong Kong, England or Australia, is one which we have every reason to feel proud of. Not only does each of us have a strong and independent judiciary and a strong and independent legal profession, but we each have a system which ensures that the two groups, judges and lawyers, understand each other. A late-entry judiciary consisting mostly of people who have been practising lawyers is a great advantage. It means that our judges have experience and understanding of the other side of the courtroom, with all the pressures of legal practice, and it also means that our judges have some direct experience and understanding of the real world (if there is such a thing) outside the courtroom.

7. That is not to say that I am against recruiting judges from other areas, such as academia or government. On the contrary, I think that limiting judicial recruitment at any level to former practitioners is positively to be discouraged. Diversity is always an important aim, and it should not be limited to the familiar categories, such as ethnic origin and gender. Diversity in social, educational, and professional backgrounds is every bit as vital. Nor would I rule out any element of early-entry judicial career structure. Not only would it add to diversity of judicial background, but it may improve diversity by attracting those who might otherwise drift away from the world of law.

8. But none of that detracts from the fact that I believe that, when it comes to advocates, our systems do produce a high quality product. On my first visit to the European Court of Justice in Luxembourg, I attended a morning's hearing before joining the ECJ judges for lunch. There were, I think, two cases, one from Spain and the other from Poland. As usual, each party had 20 minutes to put its case, and was listened to in silence, after which the judges put, I think, one question,

which was not really answered by the advocate to whom it was addressed. At lunch, the judges asked me for my impression of the hearings, and I made one or two points, basically suggesting that the hearings had been unexciting to the point of being soporifically leaden. I then asked the judges whether they didn't find it frustrating, indeed boring, to listen to advocates, without being able to ask them questions as they went along, without being able to engage in dialogue, and without being able to get them to concentrate on this points which concerned the court. The reaction was a mixture of amusement and shock. The amused judges thought that we British judges talked too much, and implied we should learn the virtue of silence. The shocked judges considered it to be judicial solecism for a judge to interrupt an advocate, and that we British judges should not be even contemplating it. Indeed, the Portuguese judge told me that, in his country, it was judicial misconduct for a judge to interrupt an advocate.

9. The conversation then moved on, but a bit later it turned back to the hearings. One of the judges commented on the fact that I had expressed surprise at the fact that in both hearings all the advocates had simply read out their submissions. Not merely was there no spontaneity: it seemed to me that there was not even an attempt to engage with the court. The judges rather mournfully agreed with me on this. They said that this was a fairly standard experience and they regretted it. One of them then said that the advocates from the British Isles were consistently and easily the best oral makers of submissions in the Luxembourg court, a proposition to which the other judges all agreed. I could not resist replying with a rhetorical question: do you not think that the British advocates are the best because they are the only ones who are constantly being challenged and quizzed by the judges before whom they appear? I believe and hope that this point was a good one and was seen to be a good one. Most advocates in mainland Europe countries seem to me to be only really at home with written advocacy, whereas one of the most valuable features of our tradition is oral advocacy.

10. Oral advocacy is different, indeed very different, from written advocacy and the best advocates appreciate not only the fact that they are different, but the fact that they are mutually complementary. Written submissions in our system lay the groundwork for oral submissions, and there is a real art in making the best of the two systems. Quite how a particular advocate combines the two forms of advocacy depends on the nature of the issues in the particular case and his or her particular style and approach. Similarly, judges differ in their approach. In a talk given a few years ago, I referred to the fact that, before a hearing, some Judges read the written material very carefully while others adopt a more light-touch approach, reserving their fuller reading until after they have heard the oral submissions. The former class, whom I called Pre-Raphaelites, know all there is to be known about the case, and can ask all the right questions, but much of their reading will have been wasted and they may have too rigid a view of the case before the hearing starts. The latter category, whom I dubbed Impressionists, waste less time reading, and are much more open-minded at the hearing, but risk only thinking of the questions to ask after the hearing. During the speech, I incautiously admitted to being an Impressionist, and was given my come-uppance a few days later when I opened my daily newspaper and saw the headline: "UK's top judge admits that he never reads the papers in a case". But, for me, I get the best out of advocates by not having a clear and well-formed view of the case before oral argument, although it means more work after the hearing.

11. Just as their vital role in the rule of law goes to show why lawyers, perhaps particularly advocates, are afforded privileges, so does that role mean that lawyers, and in particular advocates, have concomitant responsibilities. One of the great problems about access to legal advice and legal representation in the field of private and public law claims, at any rate in the UK, particularly I think, in England and Wales, is the high cost of lawyers coupled with the shrinking of the legal aid

budget. We are all familiar with calls on the government not to shrink the legal aid budget further, indeed to increase it, and such calls have obvious, and some might say urgent, force. However, it is not just the government which has the responsibility of ensuring that ordinary citizens have genuine access to justice: it is also the legal profession, and I would add, the judiciary.

12. I am not criticising the legal profession for the high earnings which some of its members, albeit not a majority by any means, enjoy. If we are to have a first class legal profession, we need some of the most able young people to become practising lawyers, and it is naïve to expect many able young people to become barristers if the financial rewards are paltry, although I must add, expressing my great admiration, that a few of the most able young people are socially committed enough to enter the less well paid areas of the law. But, human nature being what it is, the most sought after jobs at the bar (and elsewhere in the law) are inevitably at the higher paid end. While that is understandable, I have no doubt that the rewards of the job of being a well paid and successful advocate, particularly when taken together with the constitutional responsibilities which that role carries, mean that advocates, and indeed all members of the legal profession, have to do all they can to ensure that access to justice is not just a slogan but a reality. Ensuring that problems and cases are dealt with in a genuinely proportionate way, so that costs are commensurate with the amount or issues at stake is the ultimate aim, and it is one to which everyone, not least advocates, must strive.

13. That point, that legal advice and legal representation must be affordable to the average citizen, gives rise to one of the really major problems which faces the rule of law today. While there are, as I have said, a significant number of lawyers who do very well financially, there are many more lawyers, especially those concerned with most criminal and family cases, as well as with housing, social security and other legal issues of a welfare nature, who can scarcely make ends meet. In that

sense, the legal world, as so often is a microcosm of the world in general. The richest few percent of the population can afford the cost of legal advice and representation, and the lawyers who advise and represent them do very well. But, at any rate in much of the UK, the great bulk of the population have to struggle to scrape the money together to get any legal advice and representation, and are increasingly finding that legal aid is not available to them.

14. Shortage of money is one of the big issues which in many countries today confronts the rule of law in general, and access to legal advice and representation, and hence the legal profession, in particular. And in the long run it could risk undermining public confidence in the rule of law. In some countries, such as the UK, this is a difficult issue in which to excite much interest, because, due to our fortunate history, we tend to take the rule of law for granted, and we blithely ignore threats of the break-down of the rule of law. The lesson for such countries is well summarised in the adages “the price of liberty, and in particular the price of the rule of law, is eternal vigilance”, and “all it takes for evil to triumph is for good people to do nothing”. In other words, the complacency engendered by decades of internal peace and democratic government, endangers the rule of law. In other countries, the rule of law is more obviously and directly under attack, and judges and independent advocates have to risk more than being disregarded or laughed at when they speak out to support the rule of law.

15. Having said that, the economic pressures, like most challenges, have their upside as well as their downside. They force us to address access to justice and proportionality issues when, without the funding crisis, we might carry on regardless. I am certainly not saying that the upside is as good as the downside is bad. However, the financial squeeze which is being applied to so many areas concerned with the rule of law in general, and access to justice in particular, does

make us question many of our cosy assumptions and practices, which is no bad thing

16. Technology poses a series of challenges to the legal profession, but, in a similar way, it offers much in the way of opportunities. As I see it, there are three categories of challenge or opportunity. First, there is the interaction between IT developments and the substantive law. Developments in IT have greatly increased the tensions between personal privacy and freedom of expression, and between privacy and security surveillance. CCTV enables peoples' public locations to be identified, and mobile phones, tracking devices and GPS enables movements to be easily monitored. It is easy to record mobile phone conversation in the street via a listening device, secret photography or filming is easy with mobile phones, and face-recognition technology coupled with remote filming enables almost random invasion of privacy. The Snowden revelations showed that the US intelligence services had been regularly gathering what the US Court of Appeals characterised as a "staggering amount of information ... on essentially the entire population of the United States" (and much of the rest of the world) "on an ongoing daily basis", and then collating and retaining it in a data bank. It is also relatively easy to "jigsaw" various items of data from different sources, seemingly innocuous in themselves, so as to give a lot more information about us than many of us would be comfortable about. And in the criminal field, IT has assisted the growth of cyber-fraud, bullying child-grooming and illegal pornography, much of it on the dark web, quite apart from large scale hacking.

17. Statute law has difficulties in dealing with these fast-moving developments effectively, and it may have to be up to the lawyers and the courts to cope. As common lawyers, we are steeped in the notion that the law is not merely based on principle, and that practicality is just as important. That tradition should stand us in good stead when we face up to dealing with the problems as lawyers or judges.

However, I suggest that it is also close to inevitable that developments in technology will change our attitude to privacy. After all, one only has to consider the way that IT has changed the patterns and character of all aspects of our lives to appreciate that it is very likely to affect our values as well. Quite apart from this, the existence of the internet inevitably affects what can be practically achieved in terms of enforcement of privacy, and the law should never seek to acknowledge or enforce rights which are in practice unenforceable.

18. The second challenge and opportunity posed by developments in IT consists of their practical, or operational, consequences. Take such basic aspects as court bundles of documents or the disclosure exercise. Twenty years ago, hard copies of all documents, whether evidence or law, were the invariable form of court record available to judges, lawyers, parties and witnesses. Now, in the UK Supreme Court at least, every appeal must have an electronic bundle of all documents. But we are very much in a transitional phase, because everyone also has to be supplied with hard copies of all documents. Some judges, and some advocates, work only from the hard copies, some work only from the electronic copies and some work from both. In due course we will have to learn to use electronic copies alone.

19. As for the disclosure exercise, it is being revolutionised as a result of IT. The volume of potentially disclosable electronic documents, some of which have to be recaptured, in a particular case far exceeds what would have been the volume of hard copies in the same case thirty years ago. And the use of increasingly sophisticated electronic searching systems enables identification of the relevant documents to be a more intellectually challenging, targeted, and (hopefully) efficient exercise than it was even five years ago. Other changes which are indicated by IT developments are, I suggest, more long distance hearings, via videos or even skype, and, possibly, more public recordings of court proceedings.

Another big change, not merely enabled by the IT revolution but also prompted by the cost of ordinary litigation, is on-line dispute resolution, which is being actively considered by judges, the legal profession, user groups and the government in England and Wales.

20. This possible changes merge into the third major challenge/opportunity raised by IT for advocates, namely the potential future shaking up and /or slimming down of the legal profession caused by future developments in IT. In their recent book, *The Future of the Professions*, Richard and Daniel Susskind predict that, as a result of Artificial Intelligence, AI, and the Internet, the legal (and other) professions will change more in the next twenty years than in the last two hundred years, and that the public will neither need nor want lawyers (or even judges) to work as they did in the last century. We are all familiar with routine work being increasingly automated as a result of electronic developments. But in their book the Susskinds suggest that, notwithstanding sceptics' doubts, much professional work which appears to involve expertise, creativity and interpersonal skills will be capable of being done by robots or AI. The recent electronic victories over humans in chess, quiz games and Go all tend to suggest that this is not a fanciful notion, and there are reports of systems that can outperform human beings in distinguishing between fake and genuine smiles. The Susskinds point out that this potential development has ethical as well as employment implications and they call for a public debate on the issue. But the point I make today is the enormousness of the potential challenge to the legal profession pose by this potential area of development.

21. I do not want to end on a down-beat note, not least because there is no guarantee that the threat to the legal profession said by the Susskinds to be posed by IT will in fact eventuate, and even if it does, the threat may be much more muted than they suggest - and anyway it is unlikely that, even if there is a big change, it will

come about soon. The essential fact remains that the notion that an independent high quality professional advocacy profession is fundamental to the rule of law is as true as it ever was. Indeed, in our complex, global, fast changing society it is more true than it ever was. Quite apart from this, a sound system of law, and therefore a trusted and trustworthy cadre of lawyers to provide legal advice and representation, is an essential ingredient for economic success, as Adam Smith made clear 200 years ago, and as successive Lord Mayors of London have made clear in the 21st century. And, in countries such as ours with a late entry and high quality judiciary drawn mostly from advocates, the advocacy profession has another vital function, namely supplying the bulk of the senior judiciary. Without a cadre of first class advocates, many of whom are prepared to become judges, the very high standard of judiciary we enjoy, indeed which in many of the countries represented here today, is taken for granted, will be lost.

22. So, for all these reasons, a professional, expert, respected, and independent advocates profession, which faces up to its responsibilities represents a very precious asset to a modern civilised society. Indeed, it is a vital component of a modern civilised society. You all perform a very important function.

David Neuberger

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