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**IMPLEMENTATION AND APPLICATION OF THE LAW: THE
GOVERNANCE OF JUSTICE**

SOCIETY OF LEGAL SCHOLARS

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Introduction

1. Good afternoon. It is a pleasure to have been asked to talk about implementation and application of the law. I want to take as my subject the effective implementation of the law relating to the governance of the courts, tribunals and the judiciary. Let me begin with a nod to theory; not jurisprudential theory, but rather a theory of strategy: I want to carve out a way of working that does not founder on traditional jurisprudential fault lines.
2. Making common cause to achieve order out of incommensurable beliefs, i.e. with and between communities and people who have different traditions, cultural norms, language and practices, is the mark of a progressive society founded on the rule of law. Making the common cause successful involves a logic of strategy that underpins the distinctiveness of difference and uses the successful practices of dispute resolution to identify principles and institutions that articulate the principles to be derived. That gives us the authority, consistency and clarity that the rule of law needs for trust, confidence and respect to be reposed in it.
3. Strategy is concerned with actual or potential conflict when interests collide and forms of resolution are required. The strategy underpinning legislation and that underpinning the incremental development of the common law are our daily bread: academics, judges and practitioners alike. But what about the governance of our justice system? Is our governance sufficiently developed to provide for the conflict resolution that the public expects and needs?

4. Apart from a brief reforming foray into this area in the 1970s, which followed recommendations made by the Royal Commission on Assizes and Quarter Sessions, this is a question that until the start of the 21st century did not attract much scrutiny. Prior to the reforms of the 1970s, the judiciary was broadly speaking responsible for the administration of the courts. That responsibility passed to the Lord Chancellor with the creation of a ‘centralised courts administration’.¹ The successor to that organisational and constitutional change today is Her Majesty’s Courts and Tribunals Service (HMCTS). It remains accountable to the Lord Chancellor as an arms-length body of the Ministry of Justice. It has, however, since 2011 operated as a formal, constitutional partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals under what is known as the HMCTS Framework Agreement.²
5. To a certain extent this change was an inevitable consequence of 21st century constitutional reform set out in the Concordat between the Lord Chancellor and Lord Chief Justice, the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007. They placed substantial responsibilities on the judiciary concerning the effective delivery of justice. What they failed to do was to consider the question whether the changes effected in the 1970s should be unwound. The questions, which are of significant constitutional and practical importance, remain to be considered today.
6. The consequences of the 2005-2007 constitutional settlement and the transfer of responsibility were perhaps not fully appreciated at the time: they are today. Both Lord Thomas, when Lord Chief Justice, and I have explored this area on several occasions. If I can summarise the position. The new settlement placed leadership duties on the Lord Chief Justice and the Senior President of Tribunals. The duties arise at common law and under statute.³ They require both office-holders to collaborate so that justice is delivered and the justice system is administered having regard to the need for efficiency by, inter alia:
 - maintaining arrangements for the welfare, training, and guidance of the judiciary;

¹ Lord Thomas, *The Position of the Judiciaries of the United Kingdom in the Constitutional Changes* (2008), at 10 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/ljt_address_to_scottish_sheriffs.pdf>.

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<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf>.

³ An account is given in Sir Ernest Ryder, *The Duty of Leadership in Judicial Office*, (2018) <<https://www.judiciary.uk/wp-content/uploads/2018/10/speech-by-spt-leading-judiciary-sept2018-v1.pdf>>; and in E. Ryder & S. Hardy, *Judicial Leadership: A New Strategic Approach*, (OUP, 2019).

- securing the effective deployment of the judiciary across and within the courts and tribunals;
 - encouraging judicial diversity;
 - issuing Practice Directions concerning the practice and procedure in the courts and tribunals; and
 - making judicial appointments and being responsible, jointly with the Lord Chancellor, for judicial discipline.
7. Most pertinently for today, the leadership duties encompass the now shared responsibility with the Government for the effective management and administration of the courts and tribunals: for HMCTS. For that reason, the senior judiciary have worked constructively with successive Lords Chancellors to transform the courts and tribunals through the HMCTS reform programme. More than that though, we have led the reform programme - which is to say the programme within which we are reshaping the delivery of justice so that it is fit for the 21st century.

Principles

8. Such leadership can, however, only be carried out according to principle. We must both administer and deliver justice in accordance with constitutional norms, ethical principles and principles set out in statute. Those norms are ultimately justified and required by the obligation laid upon the State to secure effective access to justice. They can broadly be set out under three broad themes:
- First, accessibility and accountability. We must secure open justice. Courts and tribunals must be open to litigants, to the public and the media. The absence of open justice is the absence of justice. We must also secure democratic accountability through civic participation in the courts and tribunals. And we must secure diversity in the judiciary. The judiciary must administer courts and tribunals that have the trust, respect and confidence of all of our communities so that we are seen to be, and are open to all, and reflective of all (of the people and for the people). And finally, under this theme, and the topic to which I want to return today, we must establish a coherent, effective and modern governance structure for the judiciary: a framework that provides effective access to justice, I would suggest, through preventative, remedial and consensual dispute resolution;
 - The second theme is efficacy. Our duties must be exercised to ensure that the justice system is swift, informal, flexible, specialist or expert

and innovative: in my case these are additional statutory duties that inform the way I undertake my executive functions;

- And the final theme: our approach must be proportionate and evidenced.

Implementation

9. Those then are our duties and responsibilities and the principles that underpin how we are to discharge them. How should we implement them? What is the optimum approach that a justice system should take to secure effective access to justice? How can we be sure that we are meeting that objective? And how are we to know if we are falling short, why that is happening? Plato had Socrates remark that the unexamined life was not worth living. The same can rightly be said of the delivery of justice. Yet, for far too long it has not been examined effectively or at all; a point Professor Genn has quite powerfully and correctly been making since, at least, the late 1990s. It is past time we heeded her critique; how then do we test whether we are carrying out our duties effectively?
10. The starting point is data. Information. Evidence. When those responsible for leading and administering the justice system have previously concluded that it has or is failing to deliver justice effectively, they have not done so on any concrete data. As Professor Genn has described it, our conclusions have been based on anecdote and supposition. We cannot approach our leadership responsibilities in the same way. They are executive functions. We need data. We need evidence. And we need to be able to evaluate that evidence effectively. We need to be able to understand who are bringing claims? Who are not? And if they are not, why not? Which types of claims are being brought? Which are settling? Which are withdrawn, and why? We need to know how expensive bringing claims actually is. And by that, I mean a real understanding of the cost of litigation, and its drivers - financial, demographic and in terms of holistic outcomes such as health, social welfare, housing, security and protection, carried out through careful and detailed analytical study. And we need to know how long each type of claim takes to progress through the system. If we are to fulfil our duties we need this information. Only with it can we properly consider the best approach to judicial deployment, to judicial expertise and specialism, the nature of the judicial process, and how to secure accessibility to it.
11. The data we need, or at least a significant part of it, ought to be available to us in a way that has not previously been the case. The reason for this is the HMCTS reform programme. It is bringing about a fundamental shift in the

administration of justice. By digitising our court and tribunal processes, so that claims are fully managed online, we will have a wealth of information available to us, to an extent, and to a degree of ease of availability that we have never had before.

12. And, let me stress, I mean available to the judiciary, and particularly the Lord Chief Justice and Senior President. The information may be held by HMCTS, the Ministry of Justice or other Government Departments, but let me be clear: the data concerns the effective operation of the courts and tribunals, which since 2005 and 2007 have been the responsibility of both of us as their Presidents. Use of the information is thus very much a matter for the judiciary to determine. Justice data will often be, first and foremost, judicial data which is to be controlled by us like any other executive function in accordance with principle.
13. Digitising our administration ought to bring with it the means by which we could begin to radically recast how we deliver access to justice, and in ways that meet each of the three themes I outlined a moment ago. It could do so in two very different ways: one that the courts and tribunals have only achieved indirectly in the past - that is through enhancing preventive justice; the other, is more well-known and direct: it involves enhancing remedial or corrective justice.
14. Historically, when we have talked about access to justice through the courts and tribunals, we have been talking about access to remedial or corrective justice through the adjudicative process. As Hazel Genn and others describe it, access to substantive justice - the application of right fact to right law. In some ways that is obvious. Courts and tribunals enter the picture when a dispute has arisen and litigation has started. All litigation comes at a cost, however - to the State, to individuals and businesses. It takes time to gather evidence, to analyse it, to prepare arguments, to research the law, to test that evidence and law before a judge which has, as Bentham very rightly noted, an emotional cost to the parties.
15. In many cases, as evidence from the United States has shown, these factors mean that many potential claimants simply absorb the harm. They take no action. While for others, they are, for a variety of reasons, unaware of the fact that they could seek corrective justice. While for others again they are too vulnerable, too disadvantaged, to be able to take those steps.⁴ And thus, irrespective of how efficient and cost-effective the courts and tribunals are,

⁴ D. Engel, *The Myth of the Litigious Society* (2016)

there is for them an insuperable access to justice gap. Remedial justice will remain outside their hands.

16. As judicial leaders we are, however, responsible for ensuring that our courts and tribunals are accessible, that our processes are proportionate and effective. This leads me to preventive justice. It operates in a different way from remedial justice. It looks to provide proportionate access to justice through reducing the prospect that disputes will arise. If, as Lord Reed very rightly put it in the *Unison* case, effective access to justice is necessary in order to give proper effect to substantive law, one significant way in which we can do that is to help promote primary compliance with the law. One way to do this is to improve primary decision-making, whether that concerns private or public law decision-making. As Bentham rightly noted in the 19th century, it is far better to secure compliance with the law, with legal obligations, than it is to expend 'cost, time and vexation' on litigation to secure their effective enforcement. Primary compliance is compliance with the rule of law, without the costs to the State and individual that must be expended by remedial justice. How can we go about doing this? Let me give you some concrete examples of how we can use data to improve our ability to secure both remedial and preventive justice.
17. If you bring an appeal to the Social Security and Child Support Tribunal for a PIP decision, there is a 73% likelihood you will succeed. That raises a serious question about the quality of primary decision making. In the Special Educational Needs Tribunal, for the academic year 2018, the overturn rate for local government decision making was 89%. And these are vulnerable people often in crisis at the point that they come to us. So, if you ask me whether we can do things in a better way for them, the answer is, without doubt, yes we can.
18. If we just focused on remedial justice, our leadership duties would require us to take a number of steps, steps which we are taking through the digitisation of our courts and tribunals. They would require us to make our processes efficient and cost-effective. They would have to be designed so that vulnerable claimants could access the system more easily than they have historically. We would thus be looking at how best we can use digital technology to manage cases as best we can. We would be looking at how we can improve our decision-making, through providing video hearings, through providing what is known as asynchronous decision-making, and through developing a continuous trial approach more common to civil law jurisdictions and pre-1870 equity courts than that of the English common law trial. And we are doing so.

19. Such a process would focus on improving access to justice consistently with the three sets of principles to which I referred earlier. It focuses on remedies; in itself it will not be sufficient to promote effective access to justice for those who are likely to absorb any actionable harm done to them, for whichever reason. The only way, perhaps, that we can reach those individuals is through the development of consensual and preventive justice to improve primary compliance with the law. One thing I should stress here: there is nothing new in this. The effective provision of guidance on the law and its consequences as a means to improve compliance with the law is a well-known feature of the public good that access to remedial justice provides. The question here is how can we, as judicial leaders, help to promote a system where the courts and tribunals play a more direct role, in particular to facilitate non-rights based problem solving initiatives (which for the sake of economy I shall describe as consensual dispute resolution in all its forms), and preventative dispute resolution that improves decision making and reduces maladministration.
20. The first thing that we could do is to use our data more effectively. With digitisation of our courts and tribunals we could easily have the means to aggregate case data from claims and appeals that are brought. We ought to be able through effective use of AI, in its various forms, to be able to identify trends, trends that might not be obvious to individual judges because they only deal with some cases; trends that may not be obvious to regulators, to Trading Standards, or even to Government. We may be able to obtain information about areas where primary decision-making is not as it should be. We may be able to obtain information on where, for instance, certain types of clinical negligence claims are arising. We may be able to obtain information on where consumer protection law is not being adhered to. We may be able to help to improve the very systems which harm people.
21. Data, if shared on an anonymised and unattributable basis – as it would inevitably have to be as it would be aggregated data – with Ombudsman schemes and with regulatory bodies could lead to recommendations being made to reform and improve primary decision-making, clinical practices, compliance with private law rights and so on. More effective compliance means a reduction in harm.
22. Preventive justice in this sense is thus the means to promote systemic remedial justice for future potential litigants. In itself this should produce a more proportionate, cost-effective and timely form of justice. It has the potential to reduce the cost to the State and individuals of having to appeal to the courts and tribunals. It carries with it the potential to reduce the cost to the primary decision-maker of having to take decisions more than once. It means less of a need for individual remedial justice after an actionable harm has occurred. It

means greater access to justice – to the rule of law – for all individuals, and most importantly for the vulnerable, for those who would otherwise absorb the harm done to them or for whom damages are a measure of loss but no more than that.

23. I have recently been pursuing in the Administrative Justice Council the need for greater understanding of, liaison with, and joint work between the adjudicative work of tribunals and the systemic preventative work of ombudsman. Between us we deal with hundreds of thousands of complaints every year. Aside from the prospect of improving systems by preventative resolution, the opportunity to provide swift and simple specialist problem solving is patent. There is enthusiasm for this both in Government and among those involved in both public and private sector ombudsman schemes. Tribunals can provide informal and consensual means of dispute resolution for volume cases and binding guidance on good practice. Ombudsman and other regulatory bodies can provide both the narrow conclusion on a particular maladministration and a broad survey of a system that has inflicted harm. The information gleaned from claims and appeals can be aggregated with data from Ombudsman schemes, regulators, trading standards and Government. The steps to be taken by those bodies to make recommendations, and to see reforms effected, could be apportioned between them so that accountability for preventive action rests with the bodies best equipped to promote systemic reform. Working together, they would be a remarkable force for good.

24. There is one fundamental consequence of such an approach. It is encapsulated by the well-known expression ‘physician heal thyself’. Our data must itself be open to scrutiny. We should be able to measure access to justice and its outcomes, to measure how the courts and tribunals deliver justice. We should be prepared to answer the question whether new processes and procedures including digital forms of communication are providing a formal legal system which is accessible, with a fair and effective form of hearing, a legal remedy in accordance with substantive law and access to enforcement. That is why I am working with the Administrative Justice Council and the Legal Education Foundation to develop ways in which tribunals’ processes can be scrutinised. Our data should be open to independent scrutiny and evaluation. In that way we can be properly accountable, our justice system be properly accessible, and we will have a basis to ensure it is proportionate in its approach to the delivery of justice in all of its remedial, preventive and consensual senses. That is what leadership calls for on our part: a new governance of the justice system informed by evidence, and a strategic approach to the dispute resolution opportunities that are needed.

25. Thank you.

