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JUSTICE IN A TIME OF ECONOMIC CRISIS AND IN THE AGE OF THE INTERNET

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(1) Introduction[1]

1. Good evening. It is a pleasure to be here in Leeds tonight. This is a city with a proud legal tradition and history. Leeds Law Society, one of the oldest in the country, can trace its roots back to 1805. The North Eastern Circuit of the Bar has been proudly independent since 1876. Both Law Society and Circuit are thriving today. Leeds itself is an ever growing legal centre. On the judicial front, both Circuit and City have much to be proud of. Sir George Waller, once leader of this circuit and Recorder of Leeds, was a strong presence in the Court of Appeal in the late 1970s and early 1980s. Lord Taylor, Lord Chief Justice in the 1990s, was, as Peter Taylor QC, also Circuit leader in the 1970s and the Circuit's Presiding Judge in the 1980s. Sir Paul Kennedy, a distinguished member of the Court of Appeal till recently, also haled from these parts and was Circuit leader in the 1980s. Coming to the present, Lord Dyson, now a distinguished Justice of the Supreme Court, is a son of Leeds.

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[1] I wish to thank John Sorabji, my legal secretary, for all his help in preparing this lecture, and Richard Susskind, IT adviser to the Lord Chief Justice among many roles, for his insightful views into possible futures.

2. It is fair to say that the city, the Circuit, and the West Riding itself, have all played an important part in our legal history. Given the entrepreneurial nature of its lawyers, they are playing an important part today, and I am sure they will continue to play an equally important part in the development of the law in the future. And, rather than dwelling on the past, I thought that I would focus tonight on the present, delivering justice at a time of economic pressures, and on the future, delivering justice in the age of the internet.

3. So far as planning for the future is concerned, I would like to quote something which the US constitutional scholar Philip Bobbitt said towards the end of *The Shield of Achilles*, his magisterial (sometimes a polite word for long and dense) study of the development, and possible future development, of international law, international relations and the nation-state. He said this,

> '*It is a cliché that generals prepare to fight the last war rather than the next one, But if it is a cliché, why haven't the generals heard it – that is, why do we persist in modelling the future on the past?*
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> *The past it turns out, is all we know about the future. Things are usually pretty much the way they have been. . . .*
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> *Now it happens that we are living in one of those relatively rare periods in which the future is unlikely to be very much like the past.*'[2]

4. I do not agree with much of what Bobbitt has written, and I am agnostic if sceptical about his prediction of the end of the nation state. However, I thoroughly agree with the general thrust of that passage. And what Bobbitt sees as true for warfare and international relations is, it seems to me, also true of law and our justice system today. The growth of technology, and especially of the internet, regulatory reform, recent and possibly further constitutional reform, the present economic situation and, if Bobbitt is right, the transformation of the nation-state into the market state, all suggest that we are

[2] Bobbitt, *The Shield of Achilles*, (Allen Lane) (2002) at 815 – 816.

living in one of those rare periods where the many aspects of our future, and in particular our legal future, are likely to be rather different from those of the past.

5. Tonight I want to focus on a few aspects of our legal future, and to consider just how it may differ from our past. In particular, I want to focus on how the courts and justice system may evolve. However, before doing so, partly to set the scene for the future, and partly to make an important point in relation to the present, I would like to consider the fundamental framework within which future reform will take shape. When it comes to continuity, one set of factors which should not change are the fundamental principles which govern the practice and administration, or as we are now encouraged to say, the delivery, of justice. The fact that the future will in all likelihood differ radically from the past does not in any way imply that there will be no continuity, let alone no connection, between past and future. The change to which I refer may be relatively swift and dramatic in its effect, but, so far at least, there is no suggestion of an imminent dislocating revolution. And the present pressures on government finances mean that it is particularly important to bear in mind fundamental principles, because they must always be upheld.

6. In facing present challenges and in approaching the future, the starting point must be to identify and consider those principles. It is one thing to think deeply, as for instance Professor Richard Susskind does in his recent book, *The End of Lawyers? Rethinking the Nature of Legal Services*[3], about the ways in which technology *could* transform legal practice. It is another to consider how it *should* transform legal practice. Reform, whether planned or evolutionary, should be predicated as Benjamin Cardozo, the great U.S. Supreme Court Justice, put it, not on '*rules for the passing hour*', but on '*principles for an expanding future*'.[4] Equally, there are cuts which can be made in government

[3] (2010)
[4] Cardozo, *The Nature of the Judicial Process*, at 83.

support for legal and court services, but they are by no means the same as the cuts which should properly be made.

(2) The fundamental principle

7. There are no doubt a number of principles which will continue to underpin and inform our legal future. But, this evening, I would like to concentrate on what I would suggest is possibly the most fundamental principle, which relates to the role of the state. It is a principle which is relevant not only to the later subject matter of this talk, but it is highly topical in an age of economic austerity, with concomitant cuts in public expenditure and concerns about law and order.

8. I hope that it is not controversial to suggest that the state's most basic role is to protect its citizens; to secure their security and freedoms from being undermined by threats from abroad and at home. Threats from abroad should be dealt with by properly financed, manned, equipped and led armed forces and security services[5]. Domestically, the government ensures security and freedom through the rule of law. These two functions have represented the fundamental duty of any civilised government for millennia. Modern political and media debates concentrate on making taxpayers' money available for health, welfare and education. But they are not only relative latecomers in the field of government responsibility. They are in truth secondary to defence and the rule of law. If we live in a country which is successfully attacked or which does not enjoy rule of law, there would be little point in spending money on welfare, education and health: the government will not be able to ensure that such services are maintained, and citizens will not be able properly to benefit from such expenditure.

9. Ensuring the rule of law includes effective criminal, civil and family justice systems. I suggest that an effective justice system has three facets: (i) making clear and effective

[5] Bobbitt, *ibid* at 216.

laws, (ii) enforcing those laws effectively and clearly through the legal system, and (iii) ensuring the law and the legal system are accessible to all. All three facets involve legal services, including barristers, solicitors, legal advice centres and the courts – what is often called the justice system. Making the law is primarily the prerogative of Parliament but, in our common law system, it is also the function of the judges, and hence it involves the justice system. Enforcing the law is the function of the police, the prison and probation services, and, of course, the courts, and hence it centrally involves the justice system. And access to the law, ensuring that citizens have access to the contents of the law, access to legal advice and representation, and access to the courts, thereby ensuring access to justice, is up to Parliament, the executive, and, of course, the justice system.

10. Reform of the justice system, to our courts and the legal profession, like reform of the law, must clearly be consistent with the state effectively carrying out its fundamental role of ensuring that these three aspects of the rule of law flourish. We ignore them at our peril; we take them for granted at our peril. This may be obvious when it comes to criminal law, but it is equally true of civil and family law: if our legal rights are not clear, accessible and enforceable through the legal system, people will sort out their differences and try to satisfy their perceived rights by force: law and order will wither away, and civilised society will start to break down.

11. The principle that the state has a fundamental inalienable duty to ensure the security and freedom of its citizens only truly gains its value if those citizens live in a liberal democracy committed to the rule of law. We are fortunate to do so in this country. We have elected representatives in Parliament, chosen at regular intervals, and an executive drawn from those representatives. We have a robust, independent judiciary, committed to impartial, open justice. We have a strong, and perhaps despite appearances to the contrary, a longstanding commitment to separation of powers. We have a strong and independent legal profession. We have a robust, independent press, which at its best

scrutinises each branch of the state, and educates and informs us all. Nothing is perfect of course. In the light of events over the past couple of years, only Dr Pangloss would suggest that all is for the best in this the best of all possible worlds[6].

12. But the point is this: security and freedom are both an aim in themselves and a mechanism to ensure that we continue to live and thrive in a liberal, democratic, society committed to the rule of law. In the same way, just as it is not only essential that we maintain ourselves as a liberal democratic society as an aim in itself, but, by doing so, we will ensure that we can maintain our security and freedom. Any reform must be consistent with the maintenance, indeed the enhancement, of such a society. It must therefore provide a secure framework within which legal rights and obligations are clear, clearly understood by all and apply to all equally. It must also therefore enhance access to justice for all.

13. In all this, access to justice is fundamental. It bears repetition: everyone must have access to effective, independent, legal advice, and access to the courts to enforce and uphold those rights; and this also requires public understanding of how the justice system works. People must understand their legal rights and obligations and must be able to enforce them when necessary. Otherwise there is no mechanism whereby the promise of just, democratically arrived at laws can be a reality, and it is essential that it is a reality in a responsible, liberal democracy. As Sir Anthony May, the recently retired President of the Queen's Bench Division put it recently, '*the fabric of justice . . . is part of the fabric of society.*[7]' The fabric of justice demands equality before the law. Without it the rule of law is lost from the fabric of our society.

(3) The Courts and the Justice System

[6] Voltaire, *Candide* (Penguin Books) (1987).
[7] *Nield v Loveday* [2011] EWHC 2324 (Admin) at 202.

14. Our courts are very much a product of our past; and in particular our Victorian past. The Royal Courts of Justice in London, something of a Victorian Gothic jurisitic cathedral, are a product of the great reforms of the 19th Century, built in the 1870s to mark the shift from three different types of Courts sitting in Westminster Hall to a single new High Court of Justice and Court of Appeal. Our county court structure can trace its origins to the County Courts Act 1846. Our civil procedure is also very much a product of our Victorian past. The Woolf reforms did much to recreate our rules of court as a new procedural code, but the CPR's DNA can be traced to the original draftsman of the RSC. Both in terms of its physical infrastructure and its mode of operation our justice system is a product of the past. And that is as inevitable as it is beneficial.

15. Past reform has, as Bobbitt might put it, be very much the case of fighting the last war. Litigation cost is an obvious case in point. We have been fighting excess litigation cost since the middle ages. Since the 19th century we've been fighting it ever ten years of so through civil justice reports, each of which has looked at how we can improve how our civil justice system's operation in order to reduce cost and delay. Each report produces some improvement for a period of time, after which the generals dust themselves down and start all over again. Sir Rupert Jackson's magisterial report[8] is the latest in a long line of such reports.

16. Turning to structure, our court buildings owe their design to the necessities of parties, witnesses and their lawyers attending court for hearings, and, behind the scenes, the needs of the judges and of the back offices, which are designed to process, amongst other things, paper applications and paper bundles, and to enforce court orders.

17. If we were to continue as we have in the past, we would anticipate another civil justice report in ten years or so, which would once more address the same questions in more or

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[8] Jackson, *Review of Civil Litigation Costs: Final Report* (TSO) (December 2009) (http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf).

less the same way as all previous such reports have done. If we were to continue as we have in the past, we would simply continue to use our court buildings in the same way as we always have, to replace them with similar structures – when government funds allow (or as was the case with the building of the RCJ, where government funds and funds taken from unclaimed and unallocated monies in court allow) – and site them where they have always been situated.

18. The present economic situation renders it unlikely that funds for large building programmes are a realistic possibility. Even if they were, we should ask ourselves whether, in the light of technological innovation and the growth of the internet, we should still be thinking in historical terms. And, if we are seeing the transformation of the nation state into a market state, which as Bobbitt has it, aims to promote and enable individual choice, to maximise opportunities for all its citizens, that rather reinforces the notion that the past is currently not a credible and proper guide for the future[9]. This is perhaps all the more pertinent a question when, as the Public Legal Education and Support Task Force put it in July 2007,

> '*One third of the population has experienced a civil justice problem, but many do nothing about it – often because they think, wrongly, that there is nothing they can do or that there is no local legal advice provider who might help . . . around one million civil justice problems go unresolved every year. This is legal exclusion on a massive scale . . . the cost of managing legal problems is staggering. Ministry of Justice economists estimate that over a three-and-a-half year research period unresolved law-related problems cost individuals and the public purse £13 billion.*[10]

19. That was in 2007. I doubt things have got better since then. Let's strip back those figures. A third of the population experienced a legal problem. At a rough estimate that is over 15 million people[11]. Many do nothing about their legal problems. And the cost of this not just to those individuals, but to the state, was over £3.5 billion a year – all lost through

[9] Bobbitt, *ibid*, at 229ff.
[10] Cited in Susskind, *ibid* at 230.
[11] Office of National Statistics, *2008-based National Population Projections*, (July 2009) (http://www.ons.gov.uk/ons/search/index.html?newquery=england+population).

rights going unenforced. At any time those figures ought to give pause for thought. In the midst of an economic crisis, such amounts take on an even greater significance. The greatest significance however is however one to the fabric of justice, of society. Amidst claims of a compensation culture, which Lord Young concluded was one of perception and not the reality[12], there is a real story to tell about justice going undone at great cost to state and citizen alike.

20. How then might things be different? And different in a way which enhances access to justice and the rule of law.

(4) The future

21. First, civil procedure. At its heart the civil process is conducted on a paper-based process. Service is service of paper documents. The disclosure process requires the provision of original and copies of paper documents. Courts have paper files. Court bundles are paper bundles. This remains the case notwithstanding the development of electronic filing of documents in some cases, such as PCOL, Money Claim Online, and electronic schemes in road traffic accident cases, the RTA Portal, and electronic systems for disclosing electronic records, e-disclosure. Even the newly created Supreme Court, which requires all papers to be lodged electronically, still stipulates that many paper copies must be provided of all documents which are to be required or desired to be before the court at a hearing.

22. It is practically inconceivable that the current paper-based system will continue. The sheer speed and growth of technology over the past quarter century, over the past decade, even over the past twelve months, speaks for itself. We have moved from mainframe computers to PCs, from PCs to laptops, and from laptops to Notebooks, Ipads

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[12] 34 Lord Young, *Common Sense, Common Safety*, at 15, '*The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.*' (http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf).

and other tablets, we have moved from land-lines, via brick-sized mobile phones to the latest smartphones, and from newspapers and books to online print and now to Kindles and other e-books. We live in a vastly different world from that which shaped our current rules of court and court practices and processes.

23. We should therefore be looking to reformulate our rules of court and court processes in order to fit with this world. This must involve collaboration between government, the courts and judiciary, lawyers and those who work in the advice sector. We should, as we appear to be doing successfully with the Jackson reforms, try to take forward developments in the first instance on a local level and on a pilot basis. That is because it must be right to see what works and what doesn't work before we embark on any general reform - and even when a pilot shows that a proposal works, it almost certainly will be seen to have defects which can be eliminated, or improvements which can be made, before the proposal is rolled out across the national court system.

24. And we should not be fooled into thinking that what works in one area, will work as well in another, or that problems which exist in one area, such as in relation to personal injury claims, are universal. Lord Woolf's proposal for a single-joint expert, for instance, works well in some cases. It does not in others. And the same is true for procedural reform. One of the problems which arises from another Woolf innovation, pre-action protocols, is the unnecessary front-loading of costs. A one-size fits all approach seems to me to underpin that failing. Revision of the protocols will need to consider how to minimise this drawback. It may well do so by looking at what works well in some cases, and why and what doesn't work in others and why. Future reform, if it is to enhance access to justice, will have to be much more evidence-based than in the past and much more pragmatic in conception, development and application.

25. We should, of course, be looking at how technology can improve our court processes. We live in a world where practically anything can be bought via the internet, from plane

tickets, to groceries, to books, music, clothes, news and so on. It is inconceivable that a technologically advanced and savvy society will not in ten years be capable of filing and serving all claims via the internet. It is equally inconceivable that we should still be receiving paper bundles, paper authorities and photocopies of extracts from legal texts. We should be planning now for this future, and considering how best to recalibrate our justice system and its processes accordingly. And we should be doing so in order to reduce litigation cost and time, and to ensure that the justice system is truly open to all.

26. Such change has consequences. It requires a different court infrastructure. E-bundles and authorities do not need physical storage or processing. They do not need to be based in the same building as court hearings. They can be easily transferred around the country. At its best, and I stress at its best, this brings the promise of a more efficient and cost-effective system. There will therefore be less of a need for back office space in our courts. It has suggested that we may see our court building sold off, in the manner of old bank buildings, to become restaurants or bars. To some extent that is happening. It involves a loss of locally dispensed justice, but it is at least aimed at achieving much more efficient justice, and a time of economic crisis it is hard to object to it – at least in principle. However, reduction in the need for so much court space due to electronic developments should, I suggest, lead to such space being utilised to enhance access to justice.

27. Back office space no longer needed could be used for a number of purposes. Some could be used to house legal advice centres, to house pro bono litigation and advocacy services – thus reducing the capital outlay for such organisations, and possibly even increasing the number of such centres. In an age where Citizens' Advice Bureaus and advice centres are facing resource pressure, such a development could only be for the good. Some redundant rooms could be used to house law libraries, both virtual and traditional, which would be open to the public, and particularly to litigants. Others could host open access computer terminals, which would enable litigants – those who otherwise would not have

internet access – to file documents, serve claims, to look up cases and legal commentaries through open-source, public access, databases. Others still might be used for public legal education, for civic education for school children. Reform in the light of technological change could in this way enhance access to justice and public understanding of the justice system.

28. What about in court itself? As time goes on the incidence of paper-based evidence is bound to decrease. The growth of e-disclosure in recent years is undoubtedly just the start of this change. Disclosure highlights some interesting points. As many here will know, the English legal system involves each party disclosing potentially relevant documents to each other. Even in a paper-based world that could be expensive and time-consuming. With electronic records, where one can even reconstitute emails and other records where they have been deleted, disclosure can become unmanageable.

29. This gives rise to two thoughts. First, IT will often solve the problems it creates. That may be happening with e-disclosure. Search engines, looking for key words in electronic documents, have been devised, and seem to work as effectively as, but much more cheaply and quickly than, legal executives and junior lawyers. Secondly, IT, while seen as a servant, can sometimes be a master. If the e-disclosure problem is not solved by these search engines or similar devices, we may have to reconsider the law and practice relating to disclosure. Well-established as it is, having existed for centuries, it may have to be radically changed to render litigation in the electronic age feasible.

30. Just as disclosure is going electronic, so should much of the evidence in court. Evidence which is not from live witnesses is currently on paper in its original or processed form, but such evidence will more and more become electronic. Again this points to the need to recalibrate our court infrastructure. It also points towards the day when the judicial Ipad replaces the judicial notebook, when evidence, like authorities already tend to be, is

reviewed, highlighted and annotated in court by the judge, when legal research is carried out entirely through web-based resources. What of court hearings though? Does the brave new world point to virtual courts? Might we see the judge in his room – perhaps at home even – hearing cases via the internet? Might we have witnesses in one city cross-examined by counsel, who is in her chambers in another city, while the parties are in a third city and the judge is somewhere else entirely – all brought together by Skype or some equivalent system?

31. While the possibility of this is undoubtedly not too far away in the future, it is something which is likely to be a step too far. It clearly has its advantages in so far as reducing cost and time is concerned. And technology may well, in a short time, advance to an extent that a witness could be cross-examined over the internet in such a way that it would be possible for a judge, or jury, to properly assess their demeanour, to judge their credibility. It seems to me though that there is a great deal to be said for what might be described as the metaphysical aspect of the trial process. There is, of course, scope for some evidence to be taken via tele-conferencing or videolink, as already happens. And I should add that, while, like the late lamented Lord Bingham, I have my doubts as to the value for a judge of normally relying on the demeanour of a witness as an aid to assessing the accuracy of his evidence, I have not found a witness giving evidence on a screen any less helpful in terms of clarity or assess-ability than a witness giving evidence when physically in court. But witnesses giving their evidence in a traditional court by video is miles away from a fully electronic hearing with no court room.

32. Litigation is a serious matter, not to be embarked on lightly. In that it is like marriage; I was going to say that it does not last as long, but with the increase in the length of the average trial and the decrease in the length of the average marriage, we may be approaching a cross-over. And a trial, whether criminal or civil, is the state in action, or the state in microcosm, and is therefore a particularly serious matter. Just as Parliament

debating in the House of Commons is the state in action, so is the court conducting a hearing in court. This was perhaps most strikingly put by EP Thompson when discussing trial by jury He said this,

> '*The English common law rests upon a bargain between the Law and the People. The jury box is where the people come into the court; the judge watches the jury and the jury watches back. A jury is the place where the bargain is struck. The jury attends to judgment, not only on the accused, but also upon the justice and humanity of the law . . .*'[13]

33. It may be difficult to ensure that that bargain could be maintained by entirely virtual hearings. It may be hard to maintain the seriousness of litigation and the trial process unless court hearings take place in a physical space open to the public, in which the parties, the witnesses and the judge are present. There is currently a debate as to the extent to which court hearings should be televised. Ironically, if we are to maintain that essential feature of our system, open justice, in an age of electronic hearings conducted by the judge, the lawyers, and any witnesses in their respective offices, the only way will be if there is electronic recording and electronic transmitting of the proceedings.

34. But there is a strong argument for saying that we should continue to have physical trials with the judge, lawyers and witnesses in the same room, bearing in mind the overarching framework of a public, physical rather than virtual trial. The US experiment with the virtual court, the 'iCourthouse', and other forms of Online Dispute Resolution may be perhaps represent a step too far, except on the margins, where all parties agree to it[14] and as an exception to the physical courtroom.

(5) Conclusion

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[13] Thompson, *Writing by Candlelight*, cited in Zander, *Cases and Materials on the English Legal System,* (2003) at 509

[14] Susskind, *ibid* at 217ff.

35. Where does this leave the courts and the justice system? So far as the present is concerned, it is not enough to talk about access to justice: there really must be access to justice for the citizens of this country. It is all very well and good to refer to the economic situation and the need for cuts, but the fundamental rights of the people must be respected and maintained, just as the fundamental duties of the government must be performed. And, apart from the defence of the realm, there is no duty as important as maintaining the rule of law; and just as every fundamental aspect of the defence of the realm must be real and practical, so must every fundamental aspect of the rule of law – sound laws, proper enforcement of those laws, and access to those laws and to justice – be real and practical.

36. As to the future, I believe that, without these fundamental aspects being undermined, the future will be radically different in comparison with its past. No doubt there will be another civil justice report in ten years or so. Whoever writes it will do so in a different world from that which those of the last 200 years have been prepared. That world will demand a different approach. It will pose new questions and require new answers; both of which will stem from changes to the wider world. If that report simply prepares to fight the last war, it will fail before it has even started, that much appears clear.

37. It also leaves it looking at a future where the court infrastructure and court processes must adapt to fit a changed, more technologically-based society. This will require radical change. But that is not new. Radical change was something the Victorians undertook when they reformed our court system, and its infrastructure. Their reforms were as radical then as ours will have to be now. They transformed a system which had evolved over centuries to cater for a largely agrarian society into one fit for a thriving industrial society. We are faced with the need to transform ours from a court system designed for a 19th and 20th century industrial-based society into one fit for a 21st century technologically

advanced society. And we need to do so in a way which enhances our commitment to the rule of law and access to justice.

38. I have only touched the surface tonight of some ways in which we might effect future reform. There are of course, and will be, many others. Some of those will come about as a consequence of innovation in legal services where that is spurred on by the changed regulatory environment, greater competition and, once more, technology. Some of those will come about through the necessity of reforming legal education, both for the next generation of lawyers and judges and for society as a whole. Any such reform, such as those I have looked at tonight, should only take place where they advance access to justice and the rule of law: that should guide us in converting what can be done into what ought to be done.

39. I started this evening however by commenting on Philip Bobbitt's belief that we are at one of those rare points in time when the future is unlikely to resemble the past. I have tried to sketch out a few ways in which our legal future may differ from its past. It is perhaps fitting that I end by recalling what the famous physicist Nils Bohr is reputed to have said in response to a request to speculate on the effect quantum physics would have on the world. He responded by saying, prediction is very difficult, especially about the future. With that in mind, my thoughts this evening were offered as possibilities and not predictions.

40. Thank you.

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