

# **Justice – Tom Sargent Memorial Lecture 2013**

## **Justice in an Age of Austerity**

### **Lord Neuberger, President of The Supreme Court**

**Tuesday 15 October**

#### **(1) Introduction: the rule of law<sup>1</sup>**

1. Good evening. It is an honour to have been asked to deliver this year's JUSTICE Tom Sargent Memorial Lecture. I have taken as my subject Justice in an Age of Austerity. It is a topic which is as unoriginal as it is important and topical, but I make no apologies for its unoriginality because it is so important and topical. Without justice there is no rule of law, and the present economic crisis presents all those who are concerned about the rule of law with both problems and opportunities. And it is not just lawyers and litigants who should be concerned about the rule of law. Because it is so fundamental to our lives, every citizen should be concerned about the rule of law.
2. Of course, the rule of law can mean different things. At its most basic, the expression connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied. That is rule by law, but the rule of law requires more than that. First, the laws must be freely accessible: that means as available and as understandable as possible. Secondly, the laws must satisfy certain requirements; they must enforce law and order in an effective way while ensuring due process, they must accord citizens their fundamental rights against the state, and they must regulate relationships between citizens in a just way. Thirdly, the laws must be enforceable: unless a right to due process in criminal proceedings, a right to

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<sup>1</sup> I wish to thank John Sorabji for all his considerable help in preparing this lecture.

protection against abuses or excesses of the state, or a right against another citizen, is enforceable, it might as well not exist.

3. The rule of law is a topic which is often discussed in ringing terms, with inevitable rhetorical references to the Magna Carta, Human Rights, and Tom Bingham's brilliant book<sup>2</sup>. Everyone agrees that it is essential for any modern civilized democratic country to have the rule of law. But in a country where we have had parliamentary democracy, uninterrupted by invasion, revolution, or tyranny for over 300 years, it is difficult to strike a real chord with most people outside the legal world when talking about the rule of law. Most non-lawyers take it for granted and think of it as some abstract idea which may have had some relevance in the UK long ago.
  
4. That is to make the same mistake as Francis Fukuyama, when he wrote of "*The End of History*" in 1989<sup>3</sup>. He suggested that we should be seeking what he called "*the universalization of Western liberal democracy as the final form of human government*", as it was the culmination of humanity's social and cultural evolution. It was the same mistake as many leading physicists made towards the end of the 19<sup>th</sup> century when they thought that they had got all the answers. Just as those physicists were shown to be quite mistaken by quantum physics and relativity within a couple of decades, so was Fukuyama shown to be wrong, as, to his credit, he effectively conceded<sup>4</sup>, within a very short time.
  
5. I am not being alarmist, but there is a deep truth in the adages that the price of liberty is eternal vigilance, and that all it takes for wrong to triumph is for good people to do nothing. The media may concentrate on the government's health, social security and

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<sup>2</sup> Tom Bingham, *The Rule of Law* (London, 2010)

<sup>3</sup> Francis Fukuyama, "The End of History?", *The National Interest* (Summer 1989), expanded in *The End of History and the Last Man* (New York 1992)

<sup>4</sup> See eg *After Neoconservatism*, *New York Times Magazine* 19 Feb 2006, and *Making Things Work* The New York Times 7 June 2009

education programmes, but these are both secondary, and rather recent, functions of government. The defence of the realm from abroad and maintaining the rule of law at home are the two sole traditional duties of a government. More importantly, they are fundamental. If we are not free from invasion, or the rule of law breaks down, then social security, health, and education become valueless, or at any rate very severely devalued.

6. Like the rule of law, my topic this evening, justice, is an expression which can mean the same thing as the rule of law, or it can have the narrower meaning of effective access to the courts for citizens to protect and enforce their fundamental rights. It does not, I think, matter which of those meanings you give it in the present context, so let me assume that it has the narrower meaning.
  
7. Overall, justice in the United Kingdom is in pretty good shape, in the sense that we have a society which is governed by the rule of law, and which is reasonably civilized and successful. Hence, it may be said, the risk of complacency to which I have referred. But, while things are generally not too bad, I detect two real problems in relation to justice. Both those problems may be summarised in one word, accessibility: accessibility to the law and accessibility to the courts. And it is to those problems that I now turn.

## **(2) The law must be accessible**

8. Citizens cannot get justice if they cannot find out relatively easily what their rights and their duties are. That means that the law, which, in our system of parliamentary sovereignty with an overlay of common law, means statutes, statutory instruments (“SIs”) and judicial decisions, should be properly accessible. In terms of physical availability, the situation is pretty good, at least for those with access to the internet.

9. The Government's freely accessible [www.legislation.gov.uk/ukpga](http://www.legislation.gov.uk/ukpga) website has all statutes and SIs. But the incorporation of insertions, amendments, repeals is often very slow, which is unacceptable because there are many such changes, and a significant proportion of them are quite radical in their effect. It seems to me self-evident that any changes to legislation must be easily and promptly available to everyone. Despite the welter of legislation, which I shall shortly turn to, it would not cost very much money to keep the statutes and SIs promptly updated: even in an age of austerity, I believe that serious consideration should be given to making this improvement.
  
10. So far as case-law is concerned, the freely available [bailii.org](http://bailii.org) website does a magnificent job at trying to ensure that all significant decisions of the High Court (and its Scottish and Northern Irish equivalents) and appeal courts are very promptly reported, as well as the Luxembourg and Strasbourg court decisions. The Ministry of Justice, and indeed many others, deserve thanks for the financial support they give to the website. It would be a disaster if it shut down.
  
11. And if one uses a search engine to look for information on cases, there is often a wealth of disparate material about the more significant judicial decisions, most of it pretty accurate – and much of it on the websites of the firms and chambers of the lawyers involved in the case. (You can normally tell if they were on the winning side: their websites say if they were, but merely record their involvement if they were not. As a judge, you worry when both sides claim that they won.) And the Supreme Court website has all our decisions, including those of the Privy Council, in an easily accessible form.
  
12. We do less well on the equally important issue of accessibility in terms of substance, because of the sheer complexity and sheer volume of current legislation and case-law.

13. The quantity of legislation has increased beyond recognition in the past thirty years, and it is getting ever more complex. Governments seem to suffer from what might be called the Mikado syndrome. In the second Act of that operetta by Gilbert and Sullivan, Koko is trying to explain why he has not executed Nanki-Poo despite the Mikado's order that he do so. He says:

*“It's like this: When your Majesty says, ‘Let a thing be done,’ it's as good as done practically, it is done - because your Majesty's will is law. Your Majesty says, ‘Kill a gentleman,’ and a gentleman is told off to be killed. Consequently, that gentleman is as good as dead; practically, he is dead, and if he is dead, why not say so?”*

The Mikado replies *“I see. Nothing could possibly be more satisfactory!”* In the same way, many politicians appear to believe that, if Parliament passes legislation to deal with a problem, then the problem is dealt with.

14. Contrary to the Mikado's view, nothing could be less satisfactory. Partly because there are so many perceived problems in society, there is a welter of ill-conceived legislation – poor in quality and voluminous in quantity. The result is little more than the illusion of action without much in the way of the reality of achievement, coupled with uncertainty and confusion about the law. Self-evidently, this is not conducive to justice, and, furthermore, it brings the legislature, even the rule of law, into disrepute.

15. I mean no criticism of parliamentary drafters or of MPs or Peers. The pressure on them is such that they cannot do their jobs properly, as they themselves have made clear. Let me take a very recent example. Exactly a week ago, the House of Lords considered the Financial Services (Banking Reform) Bill, in what was optimistically described on the Parliamentary website as *“the first chance for line by line scrutiny, in the Lords”*<sup>5</sup>. Lord Turnbull, a cross-bencher, pointed out that the

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<sup>5</sup> <http://www.parliament.uk/business/news/2013/july/lords-financial-services-banking-reform-bill/>

*“total amendments [run to] 116 pages and government amendments accounting for 95 pages of that: more than three times the length of the original Bill. That tells us something about the process of legislation. We are dealing with amendments to amendments to amendments which are in turn amending statutes that have already been amended more than once<sup>6</sup>”.*

Lord Higgins, a Conservative, said that *“the way that the Bill is drafted ... makes it extremely difficult for the House to work out what is happening from moment to moment on an unbelievably complex matter<sup>7</sup>”.*

16. Lord Phillips of Sudbury, a Liberal Democrat, described “the complexity of both the Bill and the amendments” as *“quite barbaric<sup>8</sup>”*, and Lord Barnett, for Labour, said that he had *“enormous sympathy”* with the view of Lord Turnbull *“that he has never seen such a shambles presented to any House<sup>9</sup>”*. He immediately went on to say

*“As Chief Secretary to the Treasury, I had the misfortune for five years ... to take two Finance Bills a year through, mainly because the first Bill had to be amended because it had not been properly scrutinised; it had been guillotined by all successive Governments. Yet I have never seen anything remotely like this Bill<sup>10</sup>”.*

17. So here we have a Parliamentary debate on a Bill whose importance could scarcely be greater, a debate and a Bill which are condemned from all sides of the political divide as plainly unsatisfactory, and where a former Minister indicates that the problem is not new. Examples abound. With almost every recent outgoing Chancellor of the Exchequer, the already enormous and convoluted volume of revenue statutes and SIs has increased. The state of criminal statute law is remarkable in its extent and complexity. Ten years ago, the recently retired Law Lord, Lord Steyn, referred to there being “an orgy of statute-

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<sup>6</sup> Hansard; HL Deb 8 Oct 2013 : Column 18

<sup>7</sup> Ditto; Column 22

<sup>8</sup> ditto

<sup>9</sup> Ditto, column 29

<sup>10</sup> Ditto

making<sup>11</sup>”. A 2006 Law Commission report<sup>12</sup> recorded the total number of pages of statutes and SIs in 1965 as 7,567, whereas in 2005, it was three times as extensive – 20,800 pages which were more than 10% bigger than in 1965. It is fair to say that the 2005 figure incorporates European directives and regulations, which no doubt has an impact.

18. I appreciate that life gets ever-more complex, but that reinforces, rather than undermines, the need for simplicity in legislation. Legislation is often introduced because the present state of the law is less than perfect. But it is too easy to see the problems with the status quo, and too unappetising and too difficult to see the equally great, or even greater, problems which would arise if the law was changed. It is wrong to see reform as inherently good – it costs a lot of money, it increases uncertainty, and it causes confusion and loss of morale. Our ever changing world is a challenge, but our reaction to it should be principled, thoughtful and cautious.

19. We need legislation which is more critically and expertly considered and which is significantly less in quantity. Steps to that end such as Parliamentary post-legislative scrutiny, which are being taken in this regard, are to be applauded<sup>13</sup>. Less and better legislation will not only mean better justice, as the law will be clearer and simpler. Because such a change will involve fewer statutes and SIs, it will also reduce costs – an important factor in the age of austerity. And not only the direct costs of producing legislation, but also indirect costs, because less legislation means less change, and change is expensive.

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<sup>11</sup> First Brice Dickson lecture, published in *European human rights law review*, vol. 9, no. 3

<sup>12</sup> *Post-Legislative Scrutiny*, Law Commission Consultation Paper No 178, October 2006

<sup>13</sup> See eg *Post-Legislative Scrutiny* SN/PC/05232, 23 May 2013, See <http://www.parliament.uk/briefing-papers/SN05232>

20. When it comes to court judgments, we Judges could do better as well. We are often pretty prolix. When we deal with the facts of a case, that is understandable, and it doesn't normally matter, because only the parties in the case are interested, and they often want the Judge to say precisely what he or she thinks happened, or who is to be believed and why. But when Judges deal with the law, we are often setting out principles which strangers to the particular case, lay people, lawyers and other judges, should be able to understand and apply. We seem to feel the need to deal with every aspect of every point that is argued, and that makes the judgment often difficult and unrewarding to follow. Reading some judgments one rather loses the will to live – and that is particularly disconcerting when it's your own judgment that you are reading.

21. Electronic media have a lot to answer for. It's not only the word processor, which encourages prolixity, but it's also the easy electronic availability of almost every decided case. Advocates feel under a duty to cite any conceivably relevant judicial decision, and the judge then feels that the decision must then be referred to in the judgment. In addition, in this increasingly open and competitive world, many judges want to show the parties, an appellate court or the academics that they have understood every aspect of every argued point. Many of us Judges should, I suggest, be more self-confident, more ruthless, when we write our judgments.

22. And it is also important that we judges ensure, as far as we properly can, that the common law, like statute law, is as simple and clear as possible. The desire to develop the law so as to produce what the judge might feel to be a fair result in the particular case is understandable, indeed laudable. However, if we bend the law to produce what seems a fair result in the case we are deciding, we risk making the law more confusing, more uncertain, less accessible, and, ultimately, less just. It is all very well to be concerned to



be fair, but such an approach has two potential problems. First, fairness is a rather subjective and emotional yardstick by which to judge a case. Secondly, and more relevantly for present purposes, it is all very well to be swayed by the interests of the two parties in a particular case, but what about the potentially hundreds of parties who may be in an analogous situation, and who will want to know their legal rights and obligations from their legal advisers. Their concerns and interests militate firmly in favour of keeping the law simple and clear, even at the cost of producing a harsh result in the case in issue.

### **(3) The courts must be accessible**

23. The rule of law requires that any persons with a bona fide reasonable legal claim must have an effective means of having that claim considered, and, if it is justified, being satisfied, and that any persons facing a claim must have an effective means of defending themselves. And the rule of law also requires that, save to the extent that it would involve a denial of justice, the determination of any such claim is carried out in public. So citizens must have access to the courts to have their claims, and their defences, determined by judges in public according to the law.

24. There is currently an insidious idea, which started in the 1990s, around the time that the Woolf reforms were mooted, that civil litigation is not merely the option of last resort, but that it is actually a bad thing. The point was well made a few years ago by Dame Hazel Genn, when she said that it was

*“ . . . hard not to draw the conclusion that the main thrust of modern civil justice reform is about neither access nor justice. It is simply about diversion of disputants away from the courts. It is essentially about less law and the downgrading of civil justice.”<sup>14</sup>*

25. Of course, a negotiated or mediated settlement of a claim is likely to be cheaper, quicker, and less stressful than a court case fought to the end. If successful, negotiation and

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<sup>14</sup> H. Genn *Judging Civil Justice* Hamlyn Lectures 2008 (London, 2010) at 69.

mediation are therefore better for the parties. Accordingly, the encouragement of mediation as a means to resolve disputes amicably is justified. In a utilitarian sense, I suppose, it could be argued that litigation is bad, at least as between the parties to the particular dispute.

26. But this only applies where the negotiation or mediation succeeds, and, anyway, our society is not based on a primary commitment to utility. It is fundamentally based on the rule of law, and it is therefore essential that all its citizens have fair and equal access to justice.

27. Courts exist to resolve disputes, and also to vindicate rights – and to do so in public. Thus, criminal trials cannot be held behind closed doors. Even where the defendant pleads guilty in a criminal trial, the public has the right to know what happened. And where national or local government has overreached itself or treated someone unfairly, the public interest often requires it to be held to account in court in public.

28. But it is not merely fundamental principle which requires any citizen with a genuine possible claim to have access to the courts. Practicality demands it as well. I referred earlier to the fact that rights are valueless if they cannot be realised, and such realisation inevitably carries with it access to the courts. Frederick the Great supposedly said that “Diplomacy without arms is like music without instruments<sup>15</sup>”. So is the rule of law without access to the courts. If there is no, or only restricted, access to the courts, the fundamental underpinning to all forms of dispute resolution systems, such as mediation, and even arbitration, falls away.

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<sup>15</sup> I say “supposedly”, because, although it is universally attributed to FtG, I can find no specific authentication, contemporary attribution, or even good circumstantial evidence that he said it

29. Where the defendant is reluctant to mediate, the only way in which a claimant with a good case can get justice is to go to court, and any civilized system should ensure that he or she is able to do so. By the same token, if the defendant knows that the claimant can go to court, the defendant will be much more likely to negotiate or mediate constructively. And this applies both ways. The only reason that strong or rich parties (whether potential claimants or defendants) will negotiate or mediate with their weaker and poorer opponents is the knowledge that ultimately there is the authority and power of the justice system standing behind their opponents. Quite apart from this, without the court's enforcement system, a negotiated or mediated settlement would be pointless: a mediated or negotiated settlement would be as unenforceable as the original claim itself.

30. Furthermore, unless there is a healthy justice system, with judges developing the law in reasoned judgments given in public to keep pace with the ever accelerating changes in social, commercial, communicative, technological, scientific and political trends, neither citizens nor lawyers will know what the law is.

31. Access to justice has a number of components. First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the court; sixthly, an effective legal process; seventhly effective execution; eighthly, affordable justice.

32. I can pass over most of these requirements fairly fast. First, the judges: I believe that all parts of the United Kingdom enjoy a first class judiciary. While I would say that, it seems to me that the benefit of having many of the best and most experienced practising lawyers on the bench is enormous, although the degree to which they have monopolised the upper

echelons may be questionable. Widening the pool would improve things, and greater diversity among the judges would, as Lady Hale has said, ensure greater public confidence in the judiciary, and hence in the rule of law.

33. Secondly, the courts; although there have been a regrettable number of court closures in England and Wales over the past few years, the reason is understandable and the Ministry of Justice has not been inflexible or unreasonable in its approach. With the increasingly wide use of IT, it is to be hoped that accessibility will increase despite these closures.

34. As for the third factor, court administration, this has also come under pressure for obvious financial reasons. In my three years as Master of the Rolls until October 2012, I visited many courts and would like to pay tribute to the hardworking court staff across the country, who often go way beyond the call of duty to ensure that members of the public are helped, lawyers' needs are accommodated, and judges are properly looked after.

35. As for the fourth factor, the legal profession, I believe that the public are generally well served by legal executives, solicitors and barristers, who maintain high professional standards. Not for the first time, I would criticise the unwieldy and expensive regulatory system of the profession that currently exists. Surely, the time has come to reduce the complexity and the consequent cost of regulation, and hence the consequent cost of legal services.

36. I turn to the fifth and sixth factors, getting a case into court, and the legal process once a case has got to court. The pressures on the criminal courts is severe, and our criminal processes are getting better than they were, although the bigger criminal cases still seem to get bogged down on occasion. Until recently, family justice was attracting significant

criticisms from the media, but it is improving thanks to the recent reforms proposed by Sir David Norgrove, which are being implemented throughout England and Wales under the leadership of Sir James Munby. So far as our civil system is concerned, it is pretty good by international standards, largely thanks to the Woolf reforms, now reinforced by the Jackson reforms, in England and Wales, and the Gill reforms in Scotland, although there is always room for improvement.

37. I should mention the Government's recent paper on judicial review in this context. It contains proposals intended to cut down the cost and delay involved in JR applications. The desire to discourage weak applications is understandable, even, laudable, and the desire to reduce delay and expense is plainly right, at least in principle. However, one must be very careful about any proposals whose aim is to cut down the right to JR. The courts have no more important function than that of protecting citizens from the abuses and excesses of the executive – central government, local government, or other public bodies. With the ever-increasing power of Government, which now commands almost half the country's GDP, this function of calling the executive to account could not more important. I am not suggesting that we have a dysfunctional or ill-intentioned executive, but the more power that a government has, the more likely it is that there will be abuses and excesses which result in injustice to citizens, and the more important it is for the rule of law that such abuses and excesses can be brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly.

38. While the Government is entitled to look at the way that JR is operating and to propose improvements, we must look at any proposed changes with particular care, because of the importance of maintaining JR, and also bearing in mind that the proposed changes come from the very body which is at the receiving end of JR.

39. As for the proposals themselves, I would make three short points. (i) The cause of the delays complained of is largely historic, thanks to the very recent removal of asylum and immigration cases from the Administrative Court to the Upper Tribunal, which the judges proposed in 2009. (ii) Cutting down time limits for JR applications may actually increase the work, due to rushed applications and many more requests for extensions of time. (iii) The cost-cutting proposals risk deterring a significant number of valid applications, and will save a pathetically small sum.

40. I turn to the seventh factor, enforcement of judgments: there have inevitably been complaints, but nobody has seriously or convincingly suggested that our courts are failing on that ground.

41. It is when one turns to the eighth and last factor, affordability, that serious problems arise. This is attributable to two reasons: first, legal advice and representation cost a lot more than most people can afford, and, secondly, the Government is increasingly reluctant to pay what the legal profession charges.

42. So far as the Government is concerned, most people would have no difficulty in understanding, indeed in accepting, the desire to cut costs on every possible front. As a country, the UK has been, and apparently still is, spending more than it can afford, and it must make cuts. However, some aspects of expenditure are ring-fenced, and those aspects whose financial allocation is reduced are not all reduced equally. Given the fundamental importance of the rule of law as discussed earlier in this talk, I would suggest that any proposed cost-cutting in that area should be scrutinised particularly carefully.

43. Cutting the amount available for the courts risks increasing delays and decreasing the quality of justice. Although there have been such cuts in the past few years, they have been just about manageable. Cuts in the amount available for legal aid are of greater concern. Such cuts are sadly not new. Since the introduction of legal aid, eligibility has been progressively reduced: at its inception in 1950, around 80% of the population was eligible, whereas by 2008, the proportion was down to about 30%.<sup>16</sup> It is true that, over that period, the average person's wealth and income had significantly increased in real terms, but so had the cost of legal advice and representation. And the 30% figure applied before the austerity-related reductions made by the 2012 reforms.
44. Cutting the cost of legal aid deprives the very people who most need the protection of the courts of the ability to get legal advice and representation. That is true whether one reduces the types of claim which qualify for legal aid or increases the stringency of the requirements of eligibility for legal aid. The recent changes have done both. If a person with a potential claim cannot get legal aid, there are two possible consequences. The first is that the claim is dropped: that is a rank denial of justice and a blot on the rule of law. The second is that the claim is pursued, in which case it will be pursued inefficiently, and will take up much more of the court staffs' time and of the judge's time in and out of court. So that it means greater costs for the court system, and delay for other litigants.
45. The Government cites the high cost of lawyers. It is true that lawyers acting for multinational companies and wealthy individuals can earn a great deal of money; it is also true that there are one or two lawyers who make quite a bit of money out of legal aid work. But the great majority of lawyers who do government-funded work do not make very much money – especially when one allows for their expenses. And comparisons with the cost of legal aid in other countries is dangerous. Our trial lawyers do much more work

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<sup>16</sup> S. Hynes & J. Robins, *The Justice Gap* (2009, LAG) at 21.

than most of their European counterparts, because the mainland European judges are much more hands-on than they are here. So it is unsurprising that the judicial system costs more in Europe while the legal aid system cost more in the UK.

46. It is not only the Government which has a duty to ensure that all citizens have genuine access to justice. There is just as much of a duty in this connection on the members of the legal profession and the judiciary. Lawyers are far more commercially minded and profit-orientated, at least openly, than they were forty years ago when I started my legal career. That is unsurprising, as the legal profession reflects national trends, and the UK has become more commercially minded over the past few decades.

47. However, practising lawyers of all types play a vital part in the rule of law and therefore have a public duty which other people, even other professionals, do not have. Thus, the Bar Council and the Law Society, indeed individual lawyers, are well qualified to warn publicly about the dangers to the rule of law of proposals which are being put forward by the Government, and frequently do so. Often, such proposals are to the disadvantage of the legal profession – freezing or even reducing legal aid rates are an obvious and topical example. There are two points to be made about this. The first is that virtually every human being finds it very hard not to believe that any measure which is contrary to his or her interests is contrary to the interests of society generally. I readily accept that this is also true of the judiciary: contrary to what some of you may think, we are also human beings. This means that one should be very careful to check before invoking the public interest against a proposal which is contrary to one's own interests.

48. More relevantly, the very fact that lawyers rely on the public interest when challenging proposals to change the law, in particular changes which affect their income, highlights



the fact that they perform a fundamental public duty. That duty is not always satisfied by simply observing the rules of one's profession. Sometimes it involves making financial sacrifices, but that does not mean that the Government should take unfair or unrealistic advantage of lawyers. Judges also have a public duty essentially for the same reasons, indeed, as some of us like to say, *a fortiori*.

49. In that connection, the legal system, by which I mean judges, practitioners and rule makers, have an overriding duty to ensure that legal advice and litigation are as cheap and speedy as is consistent with justice. What a service-provider charges a client should not normally be interfered with by the state. However, where the service is legal advice or representation, there is a public interest in keeping the charge as low as possible. In this connection, the centrality of the hourly rate appears to me to be malign. It is, I acknowledge, difficult to value legal services, and the number of hours is a relevant factor, but it is one of many, and it has a meretricious precision. But I suggest that it is often wrong to give it a central role. As a matter of principle, it confuses cost with value. And it encourages inefficiency or worse: if a lawyer is short of work, it can be surprising how much time a particular task takes. And paying by reference to the hourly rate rewards the slow and the ignorant lawyer at the expense of the speedy and knowledgeable lawyer.

50. Whether you agree with that or not, there can be no doubt but that the judges and rule-makers should ensure that the costs of legal proceedings, in terms of the work which a lawyer has to do and the time that that work needs, are kept to a minimum. Further, the court should also be closely involved in deciding what a losing party has to pay a winning party by way of costs. Justice requires that any award of costs must be proportionate to what is at stake in the proceedings, and logic suggests the proportionality also applies to the way in which the proceedings are conducted. Unless, perhaps, both parties freely

agree, it seems to me that, in a small case, such as a plumber claiming £5,000 for work done and the householder counterclaiming for £10,000 damages for defects, the procedure before and during the hearing cannot be allowed to be the same as in a building contract dispute where the amounts at stake are £5 million and £10 million.

51. In many smaller cases, there must be a serious argument as to whether disclosure should be ordered or whether cross-examination would be appropriate. Time limits are standard in many arbitrations, and they are rightly starting to be agreed or imposed for trials, and they should reflect what is at stake. It is hard to challenge the view that a three day case costing, perhaps £100,000 on each side cannot possibly represent justice when there is no more than £15,000 at stake between the parties.

52. There is no perfect answer in every case, and it is inevitable that justice can only be done in some cases by each side spending far more by way of legal costs than is at stake in the proceedings. I accept that a disclosure-free, or at least disclosure-lite, pre-trial procedure, and a cross-examination-free, or at least cross-examination-lite, hearing is less good justice, at least in the abstract sense, than a hearing with the full monty. However, in many cases, quick and dirty justice would do better justice than the full majesty of a traditional common law trial. Parties to many disputes, particularly where small sums are involved, often just need a definitive answer, or to have their day in court. And, although the outcome of some cases is changed as a result of disclosure or cross-examination, I wonder how often that happens. And it is not even as if any system gets the right answer in every case.

53. What is required in civil cases is strong proactive judicial control to ensure proportionality, and, while my experience is more limited in family and criminal trials, I

believe that this is true across the legal system. That carries with it five requirements. The first is a first class cadre of trial judges. The second requirement is that the court rules give them the necessary powers. The third is that judges have time to read the papers to enable them to give the necessary directions. The fourth requirement is that, so far as is consistent with their professional duty, the lawyers in the case should support the judge. The final is that appellate courts refrain from interfering with muscular directions given by trial judges.

#### **(4) Conclusion**

54. I am conscious that it is easy for an appellate judge to lose touch with aspects of the world of legal advice and litigation, which is such an important aspect of the rule of law, and that the risk of losing touch now that I am in the Supreme Court, is even greater than when I was in the Court of Appeal. I am not so far gone as to believe that there are any easy answers to the question of how to ensure justice at any time, let alone during a period of austerity. All I can do is to make proposals in the hope that they will produce an improvement, although the law of unintended consequences suggests that any improvement may turn out to be very different from the original proposal.

55. Thank you all very much for listening to me.

David Neuberger

15 October 2013