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JUDICIAL LEADERSHIP

GRESHAM COLLEGE LECTURE
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(1) Introduction[1]

1. It is a privilege and pleasure to give this lecture. First, because of the long history of contact between Gray's Inn and the Inns of Chancery, of which Barnard's Inn was one. For that matter, Sir Thomas Gresham who founded Gresham College – these lovely surroundings where we are today – was a student of Gray's Inn in 1597. Secondly, because it is a delight to see an ancient tradition again flourishing; there was something of a gap between 1675 when the last Reading was given (as part of instruction by way of what we would call lectures) and 1996, when the tradition was revived. Thirdly, because of my very distinguished predecessors who have given this Reading in recent years. Old tradition though it may be, inevitably some things do change; until about 10 years ago the speaker apparently processed down High Holborn in a gown, with the Head Porter clearing the way. Unaccountably, that did not happen this evening. Times change.

2. And change, the changes in judicial leadership, is my central theme tonight. It is one that has a number of facets, in court and outside of court, all vital to the success of our justice system, both domestically and internationally. The range and extent of judicial leadership activity is striking; some aspects are traditional, of very long standing and taken effectively for granted. Others involve little short of a sea change. There is no reason whatever to suppose that the need for judicial leadership will diminish; in some areas it may well increase. The aspects of judicial leadership I wish to explore are these:

[1] I am most grateful to John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his great assistance in preparing this Reading.

(I) Developing the Law;

(II) Developing Procedure – Case Management;

(III) Reform of the Justice System – HMCTS Reform; and

(IV) Domestic Society and Foreign Relations.

3. Before turning to these issues, let me be clear about one matter: the most important task of any judge is trying cases or hearing appeals. Securing justice as between the parties to litigation is the central, irreducible core of the judge's role. We must not and do not forget that. But tonight I seek to look beyond that primary and essential task. I should however state the obvious: the views I express this evening are my own.

(2) Developing the Law

4. At first blush, the central feature of our uncodified constitution – Parliamentary sovereignty - might suggest that developing the law is a matter for Parliament and not for the judiciary. No leadership role for judges here you might think.

5. Such a view would fail to appreciate the genius of our common law system and that our constitution has always accepted that the courts have as central a role in the development of the law as Parliament. Again, we should not forget that this role is subject to Parliament's constitutional right to amend, revise or correct the common law through statute. How then did and do the courts play this role?

6. To start with, the how: what method do the Courts use? The answer to that has most recently been furnished by Sir John Laws in his outstanding 2013 Hamlyn Lectures,

published as *The Common Law Constitution*.[2] In short the courts develop the common law through a 'fourfold method': evolution; experiment; history; and distillation.[3] Here lies its genius. It is not static; the product of a moment in time. It is capable of evolving as society, and its needs, mores and conditions evolve. It is capable of developing in new, previously untried ways. If they work, they are built on. If not, they are not, and further change can be made. As Lord Judge put it recently,

'*In the common law it has been accepted for a thousand years, indeed it is of the essence of the common law, that judges may develop the law by applying its fundamental principles to new conditions and declaring them.*' [4]

7. It is one thing to talk about the common law method; it is another to discuss *what* it has produced. For that, we look to our body of case law. Anyone looking at any area of our law will see the extent to which the courts have led the way, developing, shaping and refining the law. From contract, including commercial, shipping, insurance and international trade, tort to equity and trusts and the work-in-progress on restitution, to the development of civil rights long pre-dating the Human Rights Act 1998, the list goes on.[5]

8. The broad point is this. There is little, to no, area of our law that is not the product of judicial decision-making. The courts weave out of individual disputes, precedent, statute, and where appropriate decisions and developments from other jurisdictions, a system of

[2] (CUP) (2014).
[3] Ibid. preface, p.xiii. See too, *per* Diplock LJ (as he then was) in *Hong Kong Fir v Kawasaki* [1962] 2 QB 26, at 71: "The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors."
[4] I. Judge, *Judicial Independence and Responsibilities,* in *The Safest Shield* (2015) at 276.
[5] By way of examples: *Entick v Carrington (1765) 19 Howell's State Trials 1030; Scott v Scott* [1913] AC 417

law that is capable of adapting to the needs of a changing society. As such it calls for creativity, judgment and sometimes restraint.[6]

9. In the latter regard, it is some times helpful to see ourselves as others see us. As Professor Anthony King has recently put it, the courts have been innovators but in a tempered way; one which has seen them '. . . *given half a chance . . . inclined to render unto parliament the things that are parliament's.*'[7] This is perhaps not always straightforward as a consequence of the enactment of both the European Communities Act 1972 and the Human Rights Act 1998, both of which led Professor King to the following observation:

> '*If the position of the courts has become controversial, it is overwhelmingly because parliament has invited judges to make controversial decisions. Parliament . . . has chosen to outsource to the courts a good deal of its power . . .*'[8]

Difficult decisions need to be taken as to striking the right balance; the more that controversial areas are 'outsourced' to the Judiciary, the greater the challenge for individual judges and judicial leadership.

(3) Developing Procedure –Case Management

10. Having looked at the judiciary's development of the common law, I turn next to the development of procedural law; the means by which justice before the courts is secured.

11. The Judiciary's role in formal procedural reform can be traced from, at the least, Lord Eldon LC, who chaired a Chancery reform commission in the 1820s. Other judges played similar roles throughout the course of various Royal Commissions on reform during the

[6] None of this is to ignore or discount statute or the work of the Law Commission but to recognise the absolutely central role of the Judiciary in maintaining the robust health of the law; of the common law.
[7] A. King, '*Who Governs Britain?*' (2015) (Pelican) at 270-271.
[8] Ibid. at 273.

19th and 20th Centuries.[9] More recently, we are all familiar with the Woolf, Jackson and Briggs reforms to civil procedure[10] and the Leveson reforms to criminal procedure.[11]

12. One of the most significant recent areas of judge-led reform has been the introduction of active judicial case management across all our jurisdictions from the late 1990s; a reform which as a former Master of the Rolls noted, Lord Eldon LC's Commission may well have suggested should be introduced in the 1820s – albeit it took some 180 years to take hold fully.[12] Although I confine myself here to civil and criminal case management, it can safely be said that case management is now embedded in all our jurisdictions. It is difficult to over-emphasise the cultural sea change which has taken place in this regard. Though the progress which has been made could not have occurred without the active support of the professions and other agencies involved (for example, the police and CPS in the criminal law sphere), it would not have happened without active, determined and sustained judicial leadership.

13. I begin with the sea change. Traditionally, the role of the judge in court, at least at common law, was essentially passive – acerbic interventions aside. As the two great legal historians, Pollock and Maitland put it:

'The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate

[9] For an outline of the various Commissions, see Lord Clarke M.R., *The Woolf reforms: a singular event or an ongoing process?*, in D. Dwyer, *The Civil Procedure Rules 10 Years On*, (2009) (OUP) at 37ff.
[10] H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1996), R. Jackson, *Review of Civil Litigation Costs: Final Report* (TSO) (December 2009), M. Briggs, *Chancery Modernisation Review*, (Judiciary of England and Wales (2013).
[11] The Rt Hon Sir Brian Leveson, PQBD, *Review of Efficiency in Criminal Proceedings*, (2015) (the Leveson Review).
[12] Lord Clarke M.R., ibid at 44.

methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are often reminded of the cricket-match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?'. This passive habit seems to grow upon them as time goes on and the rules of pleading are developed.'[13]

There was limited scope for pre-reading and the parties set the pace. Within very generous limits, the conduct of the trial was in the hands of the parties' legal representatives, subject, of course, to directions or rulings on the law.

14. Because of case management, now codified in all our procedural rules, that description is no longer recognisable. It, and the philosophy that underpins it, are taken for granted in civil proceedings generally,[14] as well as specialist jurisdictions such as the commercial court where it has long been the practice[15], in family proceedings, and in criminal proceedings.[16] The judge now "grips" the case, both pre-trial and at trial. Examples are readily to hand. I confine myself to those from criminal cases, where for instance, trial by ambush is largely a thing of the past and interminable and repetitive cross-examination will not do – the more especially when the complainant, victim or witness is vulnerable.[17] The culture change in criminal proceedings has been particularly striking. The rationale was outlined by Judge LJ (as he then was) in *Jisl*,[18]

'*114. The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a*

[13] F. Pollock & F. W. Maitland, *The History of English Law*, (Vol. 2) (2nd ed) (CUP) at 670 – 671.
[14] See the discussion in J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms*, (2014) (CUP), at 135ff.
[15] A longstanding hallmark being the ability to deal with disputes at speed, where warranted by commercial need; see, for instance, *Empresa Cubana v Lagonisi* [1971] 1 QB 488, esp. at pp. 490 and 501.
[16] If not, of course, universally successfully applied.
[17] See, for instance, *per* Thomas LJ (as he then was) in *R (DPP) v Chorley Justices* [2006] EWHC 1795 (Admin), cited in *Blackstone's Criminal Practice* (2016) at para. D4.10. See too, CPD I, 1A.1.
[18] [2004] EWCA Crim 696, esp. at [114] – [118]

reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody and the witnesses in trials which are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.

. . .

116. The principle therefore, is not in doubt . . . its practical application depends on the determination of trial judges and the co-operation of the legal profession. Active, hand on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty . . . cases must be prepared and conducted accordingly.

. . .

118 . . . The objective is not haste and rush, but greater efficiency and better use of limited resources by closer identification of and focus on critical rather than peripheral issues. When trial judges act in accordance with these principles, the directions they give, and where appropriate, the timetables they prescribe in the exercise of their case management responsibilities, will be supported in this Court. Criticism is more likely to be addressed to those who ignore them.'

15. The Criminal Procedure Rules now enshrine and reflect this philosophy, requiring cases to be dealt with justly, taking account of the need to conduct trials efficiently and expeditiously, the need to be fair to parties, victims, witnesses and jurors, and to acquit the innocent and convict the guilty; requiring the court to manage cases actively to that end; and requiring the prosecution and defence to ensure they assist the court in the active case management process.[19]

16. Pausing here, it may be observed that the art of case management is more complex in criminal cases than it is in civil cases. The reason is simple: in a civil case, remedies by way of costs, summary judgment or strike out are ordinarily amply sufficient to deal with

[19] Criminal Procedure Rules Pts 1 and 3.

a recalcitrant party. For obvious reasons, the question of sanctions in criminal cases is much more problematic. It is, in fact, a continuing source of concern and unfinished business.[20] There are inherent limitations on the utility of costs orders in criminal cases and, plainly, it would be unthinkable to strike out a defence and impose a custodial sentence on a defendant for some procedural failing. That said, huge progress has been made in this area, reflecting, if I may say so, judicial leadership and responsible legal professionals and other agencies. Case management is now just as firmly a part of the culture in criminal cases as it is in civil and family ones, even granting that, from time to time, a case emerges highlighting the difficulty as to adequate or appropriate sanctions.

17. Judicial work in the area of case management has been extensive; I highlight three major exercises; in which I have been privileged to have personal involvement.

Disclosure

18. The first, chronologically, relates to the problem of Disclosure in document heavy cases, especially now cases where vast quantities of electronic materials have been generated. [21] The principal (and grave) concern was that the burden of disclosure should not render the prosecution of economic crime impractical. The upshot was a review which I conducted, the *Review of Disclosure in Criminal Proceedings* (September 2011) (the Review), followed by the *Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure* (November 2012) ("the Further Review"), conducted by Treacy LJ and me.

[20] See, by way of examples: the Leveson Review, at paras. 198 *et seq.; DPP v Petrie* [2015] EWHC 48 (Admin); [2015] Crim LR 385; *R v S(D) and S(T)* [2015] EWCA Crim 662; [2015] Cr App R 27, at [71]; *R v R* [2015] EWCA Crim 1941; [2016] 1 Cr App R 20, esp. at [74].

[21] As shown recently at the GC 100 Disclosure Seminar, held at the Rolls Building on 27th April, 2016, there is a similar concern in the specialist civil jurisdictions.

19. For present purposes, the judicial role in case management was emphasised in the *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (December 2013) (the Protocol), which incorporated the recommendations contained in the Review. Judges now have the power and the duty to manage disclosure actively (and robustly) in every case; the perception that this was a matter to be resolved between the parties was wholly out of date.[22] The relevant principles, relating to this most important case management exercise – crucial in large cases for giving effect to the overriding objective of the Crim PR – have now been given effect and the force of authority by a specially constituted Court of Appeal[23] in *R v R* [2015] EWCA Crim 1941; [2016] 1 Cr App R 20.[24] In a nutshell, the culture has changed – and it has changed because of judicial leadership supported by professional best practice.

Transforming Summary Justice (TSJ)

20. The second initiative, TSJ, is a Criminal Justice System (CJS) wide project, implemented nationally in May 2015.[25] It reflects the conclusions more or less simultaneously reached by the Judiciary - following a review of disclosure in Magistrates' courts[26] - and the CPS and police as to the need for improved efficiency in Magistrates' courts. TSJ aims to enable guilty pleas to be taken and dealt with in one hearing and for contested cases to be properly case managed at the first hearing, actively progressed thereafter and disposed of at the second hearing. It has called for a fundamental change by the CPS and police,

[22] The Protocol, at para. 56.
[23] Sir Brian Leveson P, Gross and Fulford LJJ.
[24] Esp., at [31] and following.
[25] A feature of serving as SPJ is the support and dedication of those in the SPJ's Private Office. The contribution to TSJ of Sara Carnegie, Legal Secretary to the SPJ, in particular, and Alyson Sprawson, Legal & Policy Adviser to the SPJ, more recently, has been outstanding.
[26] *Magistrates' Court Disclosure Review*, 2014, written by HHJ Kinch QC, The Chief Magistrate (Howard Riddle), with the assistance of Sara Carnegie.

involving the front loading of work to permit early review of cases and their division into those where guilty pleas are anticipated (GAP cases) and those where not guilty pleas are anticipated (NGAP cases). TSJ was implemented by way of joint working and close cooperation between the Judiciary, the CPS and the police.

21. Learning from previous experience of judicial initiatives – which initially flourished and then withered[27] – a continuing governance structure has been put in place. Having regard to constitutional principle and practical reality, the structure involves parallel arrangements for the Judiciary on the one hand and the CPS and police on the other. On the judicial side, every Magistrates' court Judicial Business Group ("JBG") reports on a quarterly basis to the Judicial Oversight Group ("JOG"), chaired by the Senior Presiding Judge ("SPJ"). In this way, regular performance monitoring has been established. These are still early days but the initial signs are promising; performance in the Magistrates' court has been maintained or improved with:

    (i) an increase in the number of cases in which the plea has been correctly identified by the police;

    (ii) a reduction in the number of hearings per case;

    (iii) a reduction in the number of cases set down for trial; and

    (iv) an increase in the effective trial rate.

Better Case Management (BCM)

22. Whereas TSJ relates to Magistrates' courts, BCM is principally Crown Court focused.[28] I say 'principally' because the drive for efficiency in the Crown Court can be derailed if things go awry in Magistrates' courts; hence a real linkage between progress on TSJ and

[27] Egs., CJSSS, Stop Delaying Justice
[28] No mention of this topic would be complete without reference to the contribution made by Alyson Sprawson.

BCM enjoying success. BCM started in 8 'early adopter' Crown Court centres in late 2015 and was implemented nationally from 5 January 2016. It is incorporated in the Criminal Procedure Rules and the relevant Criminal Practice Directions and brings together a number of complementary initiatives, including the introduction of a nationally uniform Early Guilty Plea (EGP) scheme[29] and (in document heavy cases) the work done on disclosure.

23. The aim is to dispose of Guilty Pleas as early as possible and to manage those cases destined to go to trial robustly. A feature of BCM is the abolition of Preliminary Hearings and Plea and Case Management Hearings (PCMHs) and the introduction of Plea and Trial Preparation Hearings (PTPHs) and Further Case Management Hearings. The change was not of course purely semantic; the PTPH is intended to be an effective first hearing and will sometimes be the only pre-trial hearing. Wherever possible, the number of pre-trial hearings will be reduced, to the benefit of all concerned.

24. It may be noted that PTPHs are more efficient and effective when conducted digitally – a process now ensured by the phased implementation of the Digital Case System (DCS) in all Crown Court centres. As with TSJ, there has been an intense focus on implementation, involving the closest cooperation between the Judiciary, CPS and police – and the engagement of the professions. Implementation has been national, under the auspices of the National Implementation Team and local, through Local Implementation Teams. Continued judicial governance is again a feature, this time building on the reporting structures put in place between Resident Judges, Presiding Judges and the SPJ and the

[29] An initiative, in an early form, admirably pioneered by my predecessor as SPJ, Goldring LJ.

work of the judicial Crown Court Performance Group[30] – a Group which includes amongst its accomplishments the notable development (jointly with Ministry of Justice analysts) of the Crown Court Performance Tool ("CCPT").[31] In terms of overall coherence, the implementation of BCM dovetails with and forms part of the implementation of the Leveson Review. As will be obvious, these are very early days – but the response from all concerned has been encouraging and (so far) there have been more guilty pleas than expected at the PTPH, in some instances to serious offences, such as rape.

25. Pulling the threads together, I underline the culture change under judicial leadership which has seen case management embedded in all jurisdictions. While at its simplest, case management is applied common sense with a continuing emphasis on identifying the issues, evidential requirements, case progression and timeliness, this has been a vast effort – enjoying the support and commitment of every SPJ from and including Lord Judge, together with each Lord Chief Justice at the time. The judiciary could not have done this on its own but judicial leadership has been crucial. We have sought to learn from the past in our focus on planned implementation and continued governance. We have also devoted attention to ensuring that appellate courts support robust case management by judges at first instance. In terms of using available resources efficiently, clearing the decks and providing an improved public service, the importance of case management cannot be over-stated.

(4) Reform of the Justice System – HMCTS Reform

[30] A debt must be acknowledged to the work done in this regard in 2014-2015 by the then Midland Circuit Presiders, Thirlwall and Haddon-Cave JJ.

[31] The CCPT is now used by all Resident Judges and Presiding Judges when considering Crown Court performance. It includes data as to workload, trials, Guilty Pleas, Case mix and timeliness.

26. Judicial leadership is not confined to developing the law, procedure, or case management. 19th Century judges were engaged in leading the fundamental restructuring of our courts and, more broadly, the effective, administration of justice. I concentrate on more recent reforms.

27. Prior to 2003, the Lord Chancellor was head of the judiciary, and administration was very largely in the hands of the Lord Chancellor's Department ("LCD"). In the event, the Constitutional Reform Act 2005 saw the Lord Chancellor shorn of his judicial role, as well as the Speakership of the Lords. To the Lord Chief Justice went the leadership of the Judiciary of England and Wales, as well as a vast swathe of powers and responsibilities that previously lay with the Lord Chancellor. The LCD became the Department of Constitutional Affairs and then, in 2007, the Ministry of Justice. Just like the old equity court, when we do reform, we don't do it by halves.[32]

28. These reforms have been of profound significance for the Judiciary. On the one hand, they have provided a greater degree of constitutional and institutional independence from the Executive than was previously the case. Now we have a quasi-department, the Judicial Office (the JO), which provides the administrative and policy support to the Lord Chief Justice fulfilling a significant amount of the work the LCD would once have carried out. And the Lord Chief Justice represents the Judiciary's views to the government and Parliament.

29. On the other hand, the Judiciary has become subject to greater scrutiny, and without the previous political shield and representation that the Lord Chancellor used to provide (with

[32] *Knight v Knight* (1734) 3 P. Wms. 331 at 334. '*the court of equity in all cases delights to do complete justice, and not by halves*'

a senior voice in Cabinet). Another consequence of these reforms has been the emergence of what is, I believe, unique in our constitutional framework: Her Majesty's Courts and Tribunals Service ("HMCTS"), the body that administers the courts and tribunals. Unique because it is a partnership between the Lord Chancellor and the Lord Chief Justice and Senior President of Tribunals, thus a partnership between the Executive and the Judiciary.[33]

30. The upshot, which cannot be underestimated, is the massive expansion of judicial leadership, management and administration roles: the "day job" in court is now just the tip of the iceberg. As Lord Judge noted,

> *'. . . the modern Judge is increasingly involved in . . . administration. The days are over when the judicial function was performed by the judge turning up at court at 9 o' clock, reading the papers for the day's work, going into court at 10 or 10.30, sitting the court hours, adjourning at 4.30 or thereabouts, working on the day's work in preparation for the summing up or the judgment and then going home . . . the modern judge is likely to be involved directly or indirectly with many responsibilities out of court, which have nothing whatever to do with his or her judicial judgments. All this is new, but the burdens are likely to increase rather than diminish. Do not get me wrong: they add greatly to the interest of the job, but the time in which to do it does not increase.'*[34]

31. It would be a very long lecture if I dealt in any detail with the proliferation of judicial leadership roles, and what each entailed. It suffices simply to mention: the Judicial Executive Board, the LCJ's "cabinet"; the Judges' Council; the Master of the Rolls, Heads of Division, Senior President of Tribunals ("SPT") and Vice-Presidents of Divisions; the Senior Presiding Judge and Deputy Senior Presiding Judge; the Chairman of the Judicial College; the Presiding Judges; Family Division Liaison Judges; Chancery and

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[33] HMCTS Framework Documents (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf>.

[34] "*Being a Judge today*" (2013) in *The Safest Shield* (2015), at pp. 290-1.

Administrative Court Liaison Judges; Resident Judges, Designated Civil and Family Judges – the list could easily continue and I have not even touched upon other leadership roles in the Tribunals.

32. In my role as Senior Presiding Judge (SPJ), 2013 – 2015, I had the privilege of a unique vantage point from which to observe – and in many ways to help shape – the changing demands now placed on judicial leadership. "Business as usual" for the SPJ now means that he/she spends far more time out of Court than in - in my view, the one downside of the role. Had we an organisation chart, it would show that the Presiding Judges' reporting line is to the SPJ, who is largely responsible for the administration of judicial business in the courts outside of the RCJ. The SPJ is involved in deployment, promotions, training and, sadly from time to time, health and disciplinary matters. He also (a most rewarding part of the role) is responsible for liaison with the magistracy. The SPJ works very closely with and reports directly to the LCJ, is a member of the JEB and has a seat (*ex officio*) on the HMCTS Board. He is often the first port of call for dealing with government departments and policy initiatives in both the criminal and civil jurisdictions – though none of this should be thought of as downplaying the importance of and demands on the Senior President of Tribunals, the Master of the Rolls, Heads of Division, other members of the JEB and other leadership roles: I am simply offering a perspective based on my own experience. The SPJ has regular – ordinarily, daily – contact with senior officials in HMCTS. There is no doubt that the role of SPJ is a significant, demanding leadership role at the centre of our justice system – and, so far, I have only described business as usual.

33. Validating Macmillan's observation as to "events" yet again, three additional matters loomed largest in my time in office: first, HMCTS Reform; secondly, performance; thirdly, support for judicial leadership roles. Because of it being a truly once in a generation opportunity, I want to devote most time to HMCTS Reform. But performance and support for judicial leadership roles are both of such importance that I must mention them and do so first.

34. *Performance*, does not of course mean "outcomes" in individual cases; that is a matter for the Judge concerned, subject only to the appellate process. Performance does mean doing what we can, as a judicial leadership, to ensure that courts operate efficiently, making optimal use of the limited resources available. To some extent there is an overlap with the embedding of case management in the civil and criminal jurisdictions. In the County Court, for example, a focus on performance entailed devising new management information, replacing a plethora of unfocused data. This was a paradigm example of joint working between the Judiciary and HMCTS officials. As HMCTS Reform and the "Briggs" reforms develop, this will likely lead to a re-examination of the performance measures in the County Court. In the Magistrates' and Crown Courts, TSJ and BCM could not take root without a judicially led culture change which emphasised the relevance and importance of improved performance. Getting a grip on performance – which we now have more than ever before – has involved a very substantial exercise in judicial leadership. I should add that none of this can be accomplished by *diktat* from the senior Judiciary at the RCJ; it requires and has obtained support from the Judiciary at all levels across the country, who have, overall, proved notably willing to embrace change, subject to very understandable and proper probing of the practicalities involved .

35. *Support for judicial leadership roles* was a topic which very much developed during my time in office. Much assisted by the views of Resident Judges, Presiding Judges and others, we realised – not before time – that we could no longer simply leave those in leadership roles to their own devices and the benefit of encouragement from the senior judiciary. The demands were simply too great, not least at a time when frustrations over pay and pensions (to which the Lord Chief Justice has recently alluded) have threatened judicial morale. It is important to realise that, unusually at least, most of our leadership roles are not rewarded with a salary increment.[35] Here, I pause to pay warm and grateful tribute to some of the true "heroes" of the system. Up and down the country Resident Judges – and Designated Civil and Family Judges – for no extra pay, display conspicuous leadership skills in dealing with judicial colleagues, court staff and others, to keep the system afloat. As SPJ it was a privilege and pleasure to work with them. Absent salary increments, we have implemented arrangements across the jurisdictions for both time out of court and administrative support; neither is an indulgence; both are necessary to enable leadership Judges to fulfil their roles. Additionally, a more complex world has meant that while still very small in number, time consuming, sometimes corrosive and emotionally draining HR issues have been on the increase, requiring early recognition and intervention by leadership Judges; we have taken steps to provide leadership Judges with the relevant training and support – including much wanted leadership training –though I apprehend that there is still some way to go.

36. I turn to *HMCTS Reform*.[36] Following years of salami sliced reductions in resources , it has been apparent from late 2012 (if not before) that strategic reform was an imperative. The only alternative was decline. Reform has proved as daunting as it is exciting – truly

[35] Heads of Divisions, the SPT and Senior Circuit Judges are exceptions.
[36] Any mention of HMCTS Reform, demands recognition of the exceptional part played by DJ Michael Walker and Joanna Otterburn, Private Secretary to the SPJ 2013 – 2015.

a once in a generation opportunity to provide an improved justice system. Subject of course to the LCJ and the JEB, the SPJ has been the judicial lead on Reform. In my time, Fulford LJ, then Deputy SPJ (now the current SPJ) led on IT and the SPT has throughout occupied a pivotal position[37].

37. HMCTS Reform involves an integrated programme with three strands: (1) transforming our IT; (2) modernising our estate; (3) changes to our working practices. To emphasise: this is a transformational programme (truly so called) and an integrated programme. With the support and agreement of both the Treasury ("HMT") and the Ministry of Justice ("MoJ") and of successive Lord Chancellors,[38] funding of some £700 million plus has been agreed. Moreover, HMT has agreed various flexibilities and the "ring fencing" of the proceeds of asset sales, so that these can be reinvested in the programme.

38. It needs to be emphasised at once (as the LCJ has put it) that this is not "reform done to" the Judiciary; quite the contrary. HMCTS Reform can only be successfully accomplished with judicial participation, nationally, at Circuit level and locally – hence the establishment of Local Leadership Groups. By its nature, much of the programme must be judicially led. Because of the need for engagement by the judiciary across the country, much judicial leadership time has been invested in road shows; my Deputy and I undertook more than 30 in 2015 and found them, without exception, valuable and stimulating. Communication between the SPJ and judges across the country is an essential part of the process. Judicial involvement and leadership must also be jurisdictionally based; proposals for reform must satisfy those with practical experience of the

[37] See, most recently, *The Modernisation of Access to Justice in Times of Austerity*, by Sir Ernest Ryder, the current SPT (5th Annual Ryder Lecture, the University of Bolton, 3rd March, 2016)
[38] The Rt Hon. Chris Grayling MP and the Rt Hon. Michael Gove MP.

jurisdictions in question. For this reason, Judicial Engagement Groups (JEGs) were established[39] and have already repeatedly proved their worth.

39. Even this brief outline of the Reform programme serves to illustrate the sheer scale of the judicial leadership task, perhaps best exemplified (if I may say so) by the tireless commitment, drive and energy displayed by the LCJ personally to ensure its progress. That said, judicial leadership is a necessary but not sufficient condition for success. HMCTS Reform could not be accomplished without the closest cooperation between the Judiciary and HMCTS – joint working at its best - involving the complete commitment of the HMCTS senior management team[40], together with support and guidance from the HMCTS Board, under its universally respected and independent Chairman.[41] Importantly, this is an HMCTS programme, as reflected by the governance arrangements under the overall aegis of the HMCTS Board, always subject of course to the Board needing to report to its principals: the Lord Chancellor and the Lord Chief Justice, together with the SPT.

40. Significant progress has already been made; the Reform Programme is real – it is not aspirational or theoretical. By way of examples only, our criminal courts are now largely equipped to work digitally. For certain traffic offences, there is the facility for online pleas. The first automated rotas for magistrates have been introduced. The Divorce Online project has commenced. The crime Wi-Fi solution will in due course be extended to Civil Family and Tribunal (CFT) hearing venues. The rationalisation of the estate has begun, with the close and continuous involvement of the Judiciary, both nationally and

[39] Civil (CJEG), Tribunals (TJEG), Family, Magistrates and Crime and, more recently still, a "Delegated Case Officer JEG".
[40] Under its Chief Executives, Peter Handcock and Natalie Ceeney.
[41] Mr Robert Ayling, another to whom I owe a great debt.

locally[42]. This is exciting; it is also – as I have already said – daunting. We need to get it right. If we do, it will be a legacy for the future, both for the Judiciary and a reforming Lord Chancellor. The foundations are sound; we need to press on, "full ahead" to implement the programme as a whole.

(5) Domestic Society and Foreign Relations

41. Finally, I want to touch upon – time permits no more – two other areas where the Judiciary's leadership role may be explored, even though they are largely the preserve of Parliament and the Executive; these are domestic society and foreign relations.

42. First, domestic society. It is axiomatic that the two primary functions of the State are Defence of the Realm and the provision of law and justice. If the State succumbs to its external enemies, all is lost. If it does not uphold law and justice, no other rights can be enforced or entitlements enjoyed. Against this background, it is impossible to overestimate the importance of the rule of law and an independent judiciary to our society. As often said, the Judiciary is the guarantor of the rule of law and, as such, its domestic role is crucial. It serves to define the society we are. Here too, there are significant leadership demands, calling for principled but finely tuned judgment. The key point is that the Judiciary is not simply another group of senior officials; it is a branch of the State, distinct from and independent of both Parliament and the Executive. The task of the judiciary and its leadership is demanding. It is to achieve the right combination of judicial fearlessness and independence with an appropriate sense of restraint, recognising and respecting the proper sphere of the other two branches of State. Not entirely

[42] See the very interesting recent Report by JUSTICE, *What is a Court?* (Alexandra Marks *et al*, 2016)

straightforward then! What it plainly calls for, to adopt Lord Judge's word, is "fortitude"[43] – fortitude from individual judges and fortitude from the judicial leadership.

43. Turning then to foreign relations. English law and our courts and arbitration tribunals are world leaders. It follows that, subject to constraints (budgetary, time and the proper limits of judicial conduct), our Judiciary has a significant role to play in this sphere and the task of judicial leadership is to set the goals and prioritise accordingly. The unifying principle for the Judiciary here is upholding or building the Rule of Law internationally. In part, this role involves working in the national interest, in coordination with the FCO – the Judiciary cannot freelance on foreign policy – while of course preserving judicial independence throughout. In further part, this principle complements underlining and promoting the leading role of English law internationally and London's world leadership in dispute resolution. Our approach in this latter regard should be principled and should seek to build comity between courts – as flagged by the LCJ's recent initiative to establish a worldwide forum of Commercial Courts,[44] aiming to learn from one another, to ensure that the rule of law is upheld in international markets and that the development of the law keeps pace with changing commercial practices.

(6) Conclusion

44. Let me now draw some conclusions from this discussion on judicial leadership.

(i) The leadership demands on a good many judges have changed beyond recognition. As I have suggested, judicial leadership is a necessary condition for the culture change

[43] *Being a Judge Today,* in *The Safest Shield (op. cit.),* at p.291
[44] See the LCJ's address, *Commercial Justice in the Global Village: The Role of Commercial Courts, DIFC Academy of Law Lecture, Dubai, 1st February. 2016, esp. at pp. 17 and following.*

achieved in case management and the success of the Reform programme, also for getting a grip on court performance. All this is in addition to the role taken for granted in developing the law, in helping to define the society in which we live and seeking to boost the Rule of Law, English Law and London, internationally. Still further, the Judiciary's leadership role now requires engagement to a significantly greater extent than in the past with the Executive and Parliament. The range and scale of judicial leadership is now striking. But every additional leadership demand on judges, comes at a cost in terms of time and the need to deal with cases in Court, not to mention the pressures on individual Judges. Hard choices need constantly to be made. We do not want our most senior judiciary to become detached from the business of judging; but extensive involvement of this same group is indispensable to shaping the justice system of the future. Putting it bluntly, there is, currently, no substitute for judicial leadership in the areas it now covers.

(ii) I cannot foresee any lessening in the demands for judicial leadership and the opposite is more likely to be the case; there is no going back to a more closeted world and therefore no easy answer to ensuring the right balance between time in Court and leadership time out of Court. Realistically and for the time being at least, we may need to accept this feature of judicial life and structure senior roles accordingly.

(iii) One measure which should assist would be a significant strengthening of the support available to the Lord Chief Justice, the JEB, the SPJ and other leadership Judges. This is not – and should not be misinterpreted as – a criticism of officials currently in post. It is instead setting a new benchmark. In my own experience as both a Presiding Judge and SPJ, I have had the pleasure of working closely with a number of officials who can truly be described as excellent; and what a difference it made. But if we are

to free judicial leaders from some of the work which currently and necessarily (in my view) falls upon them, then we should be exploring a step change in the support available. A number of role models from both the Judicial Office and HMCTS spring readily to mind.

(iv) To be clear, one variant which, to my mind, we must at all costs avoid is a model where "managers" rather than judges hold sway. Unfairly or not, that is the perception many have of the NHS – a perception that clinicians answer to managers rather than vice versa. Managers answering to judges, subject to appropriate public accountability, is one thing: judges being directed by managers is another and would be, in my view, flatly unacceptable.

(v) The Judiciary's extensive involvement in leadership means that we are entitled and bound to think more about the optimal structure for the justice system as a whole and, in particular, whether the constitutional reforms of 2005 and the following years comprise an unfinished journey. Is it right that HMCTS should form part of a larger Ministry, which has responsibility for Prisons? Would the governance arrangements for HMCTS and, hence, the Reform Programme and our ability to implement it, be simplified and improved if HMCTS reported to a single shareholder (the Judiciary) rather than both the Executive and the Judiciary? Would that assist in attracting dedicated, high calibre support for the judicial leadership from HMCTS, which could reduce the burden on the Judiciary that I have sought to describe? What governance, budgetary and accountability mechanisms would need to be put in place? None of this is novel, still less heretical, internationally. Is there attraction in a system such as that in the US where the Administrative Office of the United States Courts supports the Federal Courts and is independent of the Executive Branch? Likewise as to Scotland,

where the creation of the independent Scottish Courts Service has led to the transfer of the authority for the administration of the courts from the executive to the Judiciary; it is said that the "mindset" has altered and for the good. While such considerations should not distract all concerned from the immediate imperative of implementing the Reform Programme, I would be surprised if we avoided discussing them in the future – not least because they have a very considerable bearing on the framework within which judicial leadership operates.

45. We live in interesting times. They make for a more interesting, if more demanding, judicial world - one that calls for more reflection on judicial leadership and what it means in the 21st century.

46. Thank you.