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**RETHINKING THE LEGAL PROFESSION IN THE 21ST CENTURY - FUTURE MODELS FOR
DELIVERING LEGAL SERVICES**

JUSTICE FOR USERS – NEW STRUCTURES ON OLD FOUNDATIONS

COMMONWEALTH LAW CONFERENCE 2011

“A thousand years of judgment stretch behind -
The weight of rights and freedoms balancing
With fairness and with duty to the world:
The clarity time-honoured thinking brings.
New structures but an old foundation stone...”
(*The Supreme Court poem* 2009, Andrew Motion, Poet Laureate)

Introduction

1. These words come from the poem written by the Poet Laureate to mark the setting up in 2009 of the new Supreme Court for the United Kingdom. That event was a powerful symbol of renewed commitment to the rule of law at the beginning of the new century, and especially to the principle of the independence of the courts from the executive. The title of this session, however, invites us to look at things from a more practical perspective. How can we as judges better serve our users? How can the structures of justice be remodelled to help us?
2. In this paper I shall look at these questions by reference to three important recent developments in the UK legal scene. First the new Supreme Court itself. Then I shall say a few words about another important building project of symbolic importance, overtly directed at improving its share of a competitive market for legal services. That is the new commercial court building (the Rolls Building) due to open in London later this year. Lastly I shall move to the other end of the spectrum, to the more modest aspirations of the project with which I personally have been most closely involved in the last few years, that is the reform of the UK tribunal system.

The Supreme Court



3. The new Supreme Court is of course firmly rooted in the traditions of the predecessors in the House of Lords or the Privy Council. But its market has changed out of all recognition. In those great days of the British Empire, the Law Lords were the ultimate arbiters of the law for a large part of the human race. Most of the cases were about business or property. Public law as a separate concept hardly existed.
4. Today the international status of the court and its workload are quite different. Within the common law world it is matched in influence and intellectual power by a number of supreme courts in other parts of the Commonwealth. Within Europe, it must pay deference, within their respective spheres, to the European Court of Justice and the European Court of Human Rights.
5. One can get a snapshot picture by comparing last year's (2010) Appeal Case reports with those of one hundred years before (1910). In 1910, 66 appeals were reported, 42 by the House of Lords, and 24 by the Privy Council. The Privy Council cases came primarily from Canada (11 cases) and Australia (6 cases), the others from countries such as New Zealand, Hong Kong, and South Africa. Many (17 out of 66) related in one way or another to mining or railways. Other popular subjects were shipping, tax, and a variety of one-off cases such as peerage, licensing, and defamation.
6. Today the picture has changed completely. The international work of the Privy Council has been reduced to a fraction of its former glory. In 2010, only 23 cases were

reported (out of some 60 decided¹) none from the Privy Council.² The great majority involved public law, particularly human rights, judicial review, immigration, and extradition, the other main subject being family law 4 cases. Very few are about business or property. The majority of the parties are publicly funded, either government departments or private litigants in the few categories which still attract legal aid (such as asylum-seekers). In effect the service is being provided largely by the public for the public at public expense.

7. Few now question the symbolic value of the new Supreme Court, or the quality of the building itself and its state-of-the-art facilities. This is in large part due to the close involvement of the senior judges in the detailed planning, and the enthusiasm with which, after a cautious start, they threw themselves into that work. One very important gain is in the opening to the public of the workings of our highest court. The building itself in Parliament Square is highly accessible even to passing visitors. Television cameras are installed in the courts, and the proceedings can be filmed. The new website is user-friendly and informative. In another new departure, a recent television film showed four of the justices, led by the President Lord Phillips, talking frankly about the work of the court, and their own part in it (they even revealed startling facts about their ordinary lives, such that they travelled by underground or bicycle, and did their shopping at supermarkets).
8. Less attention perhaps has been paid to defining the role of the Supreme Court in the modern world. President Barak (former President of the Supreme Court of Israel) has given his view:

“The role of the supreme court is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's concern is broader, system-wide corrective action...”
9. That implies that at this level the process should look beyond the interests of the immediate parties; it should look primarily to the future, not the past. The judgments should be directed at those who interpret and apply the law from day to day, as judges, decision-makers, or legal advisers. Their need is not for intellectual stimulation, but for guidance as to what the law is and how practically to apply it, in terms as simple and clear as the subject matter allows.
10. A big challenge for the Supreme Court, as for all appellate courts, is what I would call “taming the common law”. Complaints about what Lord Diplock called the “superfluity of citation” have been a frequent theme in the higher courts. More than 30 years ago, he called for restraint:

“The citation of a plethora of illustrative authorities, apart from being time and cost-consuming, presents the danger of so blinding the court

¹ By contrast the Indian Supreme Court which according to its website delivered 1015 “reportable” judgments in 2010.

² 23 judgments were delivered by the Privy Council in 2010, but none made their way into the Appeal Cases reports. The geographical spread was of course much smaller (the great majority came from the West Indies or Mauritius).

with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase”.³

11. That of course was long before the internet revolution led to exponential growth in the availability of potential cases. In 2000 Lord Bingham, speaking extra-judicially said:

“Large numbers of decisions, good and bad, reserved and unreserved, can be accessed... it seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material...”⁴

12. The problem remains. In the recent television programme Lord Phillips spoke of a recent case in which the list of authorities ran to 400 cases. It was not clear whether he spoke with pride, horror or mere resignation. But it must be for the Supreme Court to take the lead in enforcing rigorous discipline over the advocates in the preparation of cases before it. It is to be hoped that they will follow the lead of Lord Judge, in the Criminal Court of Appeal:

“If it is not *necessary* to refer to a previous decision of the court, it is *necessary* not to refer to it. Similarly, if it is not *necessary* to include a previous decision in the bundle of authorities, it is *necessary* to exclude it. That approach will be rigorously enforced.”⁵

13. Another striking contrast between 1910 and 2010 is in the length of the judgments. In the 1910 volume of Appeal Cases the average length of a judgment was 10 pages; in 2010 it was 60. That is partly due to the increase of cases with multiple judgments. Lady Hale touched on these issues in a recent interview for UKSC Blog (yes, there is one!). She had asked a group of judicial assistants (our version of US Supreme Court clerks) for the high points and the low points in the court’s first year. The case they highlighted was one about the rights of the Jewish Free School to exclude pupils on religious grounds. The court found that the school had broken the law by refusing to admit a boy, whose mother had converted from Catholicism to Judaism under a non-Orthodox authority.⁶

14. Lady Hale explained why the judicial assistants regarded it as example of both high and low points:

“(a) the high point – interesting subject matter, a large and committed audience, nine fully engaged justices, excellent advocacy, and (in their view) the right result; but

(b) the low point – they thought that we really should have got our judgment-writing act together...”

³ *Lamber v Lewis* [1982] AC 225, 274. Similar citations over

⁴ Cited in *R v Erskine* [2009] EWCA Crim 1425 para 73) (as part of a series of quotations on the same theme over more than 100 years).

⁵ *R v Erskine* at para 75

⁶ *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 WLR 153

15. They had complained that there were nine judgments, including five full judgments “reasoning through the law to exactly the same approach”, and two different groups of dissentients. She observed that higher court advocates and academics welcome separate opinions because they give them something to argue about, but that what lower courts and litigants want is clear guidance.⁷ As a spokesman for the lower courts I have no doubt which interest should prevail.

The Rolls Building and the Market for Justice



16. I move to a context in which the customer is important, not simply because he is a litigant seeking justice, but also because he has buying power in an increasingly competitive market for high-value litigation business.
17. Legal services make a large contribution to the foreign earnings of the UK (nearly £3bn in 2007). Further, one of the factors contributing to London’s position as a major financial centre is the high standing of the country’s judicial and legal system. Judge George Dobry, who was commissioned by the Lord Chancellor in 2000 to conduct a review of the UK’s international legal relations,⁸ perceptively observed:

⁷ <http://ukscblog.com/judgment-writing-in-the-supreme-court-brenda-hale>

⁸ He was then aged 80, after a long and varied career in the law, which included returning to his native Poland in 1989 after 50 years to establish a school of English law at Warsaw University, which is still flourishing (as is he).

“The invisible export of legal services is of major public importance commercially, professionally and also politically. An ‘export’ of English law and its system is of precisely similar significance. The two ‘exports’ are actually indivisible, because the success of English commercial legal skills abroad is linked to the high regard for the English Judicial System, and the operation of the Rule of Law in this country...”⁹

18. Approximately 70% of all cases issued in the Commercial Court involve at least one, and usually more than one, party who are foreign, in the sense of having their corporate seat overseas.
19. It is also a very competitive market. Businesses are free to choose any law and any forum to resolve their disputes. There is increasing competition, both within and outside Europe to win the prize of global commercial law of choice, ranging from New York’s long-standing challenge, to China’s aspirations. An internet search will reveal how many “commercial courts” and “dispute resolution centres” have been sprung up all over the world: Wuhan, Dubai, Qatar and Singapore. They are all competitors for commercial litigation, no doubt claiming that their procedures are quicker, cheaper and more reliable.
20. The Rolls Building is designed to meet these challenges. It will bring together in one building the judges of the Commercial Court, the Chancery Division and the Technology and Construction Court. It will be the largest specialist centre for business and property litigation in the world. Users will find a compact, modern, one-stop shop with, for example, listing offices and registries side by side, and courts selected for their cases to suit the numbers likely to attend. There will be 31 Courtrooms (including 3 “super courts”), hearing rooms for Masters and Registrars, and 55 conference rooms, a much better ratio than in the RCJ main site. It will be fully wired for computer use in every court. The move coincides with the start of electronic filing in all three court groups. Judges of all three divisions have been closely involved with administrators in the planning of the building and its facilities at every stage.
21. When the project was launched in 2006, it was described by the then Lord Chancellor, Lord Falconer, as “the biggest dedicated business court in the world”, intended to “maintain the UK’s world-class reputation as the first choice for business law”, supporting legal services which contributed “hundreds of millions of pounds to the UK economy”.¹⁰ Five years on that aspiration is about to become a reality.

Tribunals for Users

22. Finally I turn to the other end of the spectrum. If the Rolls Building represents the Harrods of the judicial market, the tribunals are more at the IKEA end, catering largely for a bulk, low-value market. In this case we have no grand new building, but

⁹ Dobry: Review of International Legal Relations Feb 2000, p 5.

¹⁰ HMCS Press Release 14.12.06

we do have a radically reformed structure, which has brought together in one organisation a diverse range of more than 30 different specialist jurisdictions, principally relating to disputes between citizen and state, but also employment. The reforms in general follow the lines proposed 10 years ago by Sir Andrew Leggatt in his report: "Tribunals for Users- One System One Service"¹¹ (The details can be seen on the tribunals website.¹²) I have been privileged to help the reform process in the newly created office of Senior President of Tribunals. We have come a long way since Leggatt. Lord Justice Sedley said recently: *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859

"The edifice of administrative and adjudicative tribunals created by the TCEA is a landmark in the development of the UK's organic constitution..."¹³

23. We do have some high-value customers, like corporate institutions within the tax and regulatory jurisdictions. But for the most part our customers include some of the most vulnerable members of society, such as welfare claimants and mental health patients. The high-value customers can look after themselves, but the latter need our active help. Many have no access to legal advice or representation, and rely on the tribunal to ensure that their cases are properly understood and resolved.

24. Leggatt had a simple guiding principle:

"it should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases."

25. The 2004 Government White Paper¹⁴ which followed the report went even further. The new tribunal organisation would not just be a passive recipient of cases for disposal, but would have an active, pre-emptive role:

"... Its mission will be to help prevent and resolve disputes, using any appropriate method and working with its partners in and out of government, and to help improve administrative justice and justice in the workplace, so that the need for dispute is reduced."

26. The new approach can be illustrated by reference to the Social Entitlement Chamber, which handles mainly welfare benefit appeals. The name reflects the fact that this is not like adversarial litigation in the courts. Welfare benefit is a right granted by the state, which is often essential to maintain a basic standard of living. The tribunal's object is to arrive at the correct entitlement, no more no less. As Lady Hale has said,

¹¹ <http://www.tribunals-review.org.uk/leggatthtm/leg-ov.htm>

¹² <http://www.tribunals.gov.uk/index.htm>

¹³ *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859

¹⁴ Transforming Public Services: Complaints, Redress and Tribunals July 2004 (<http://www.dca.gov.uk/pubs/adminjust/adminjust.htm>)

the process is “inquisitorial rather than adversarial... a co-operative process of investigation in which both the claimant and the department play their part.”¹⁵

27. Unlike the commercial court, we have no direct competitors. No-one suggests that the civil courts could do the job more efficiently or economically. The risk, if any, is that government will think that it can do the job adequately in-house, and seek to limit rights of appeal. The Social Entitlement Chamber is a good example. The current recession, combined with legislative changes, has caused a dramatic increase in the workload, with consequent pressure on the system. From 2008-09 to 2009-10, social security appeals received rose from 242,800 to 339,000, and they are expected to rise to a peak of 436,000 in 2011-12. That is a growth of some 80% in three years. As nearly all these cases are about basic living needs, they must be dealt with quickly.
28. Tribunal justice cannot be turned on and off like a tap. Even if we are dealing with bulk, low-cost justice, quality cannot be compromised. Tribunal judges and specialist members (such as doctors) have to be recruited through the Judicial Appointments Commission, which takes time, and they need to be trained.
29. We have also had to re-examine our own processes at all levels, including what happens before a case gets to the tribunal. A taskforce was established with representatives of the tribunal judges, the tribunals’ administration, and the Department responsible for welfare payments. They have been working on measures with the Department to improve communication with claimants, to develop internal review procedures, and to improve feedback from tribunal decisions. Early results show a 20% reduction in the number of cases going to tribunal. By a combination of such initiatives we are gradually getting top of the backlog and bringing levels of service back to what they should be.
30. Training of judges is of course vital. At the moment, almost all the training funded by this process is delivered ‘in-house’ with each jurisdiction planning, organizing and executing its own training programme for its members. Hitherto these arrangements have been largely separate from the Judicial Studies Board which oversees training for court judges. That is about to change. On 1st April this year we will establish a new “Judicial College”, which will bring together in one organisation training for all courts and tribunal judges.
31. Now we have the structure in place, the big challenge is how to use modern technology to improve the efficiency of the service. One of my statutory duties as Senior President is to have regard to the desirability of innovation. We are still largely stuck with a paper-based system, sending bundles of papers physically round the country. Attempts to develop effective on-line systems have not been as successful as hoped. We are using video-conferencing for evidence, but we need to go further. We should need to question the assumption that people have to make a journey to a physical court or tribunal to get justice. Much can be done, conveniently, effectively and cheaply, by use of on-line communication, by telephone (particularly for mediation), perhaps even by Skype.

Conclusion

¹⁵ *Kerr v Dept for Social Development* [2004] 4 AllER 385; [2004] UKHL 23 paras 61-3, per Lady Hale.

32. The title of this session invited us to look at things from a practical perspective – that of the consumers of legal services, and how we as judges can best meet their needs in the 21st century. The public spends a lot of money on courts and judges, both as litigants and taxpayers. It is entitled to ask that the money is spent in a way that is cost-effective and meets the needs of its market. Although the nature of the market and its needs differs from court to court and at different levels, the principle is the same. Echoing Leggatt, as judges we must never forget that courts and tribunals exist for their users, not the other way round.

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