



LORD CHIEF JUSTICE  
OF ENGLAND AND WALES

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LORD CHIEF JUSTICE OF ENGLAND AND WALES

RESHAPING JUSTICE

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DELIVERED TO THE ORGANISATION “*JUSTICE*”

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**Introduction**

1. It is a pleasure and a privilege to have been asked to give this short address tonight. It is an important time for both *Justice* the organisation and for our justice system. With that in mind I want to focus on what I have described in the title as “Reshaping Justice”.<sup>1</sup>
2. I have two purposes. The first is to make clear that our system of justice does need reshaping to deal with the fundamental change that is occurring in the role of the State. It is retrenching. The budget for justice is being reduced substantially. We must ensure that our system remains able to maintain the rule of law by administering justice effectively, speedily and impartially in this new age. The second is warmly to welcome the re-shaping of *Justice* and to say how very encouraged I am that *Justice* in its re-shaped form can and must play a vital role in reshaping our system of justice
3. Before I do so however I want us all to take a moment to step back in time to 4 December 1945 and to what one of the founders of *Justice* said at Nuremberg. After a short introduction and a reference to the allied victory, he said:

There are those who would perhaps say that these wretched men should have been dealt with summarily without trial by “executive action”; that their power for evil broken, they should have been swept aside into oblivion without this elaborate and careful investigation into the part which they played in bringing this war about: *Vae Victis!* Let them pay the penalty of defeat. But that was not the view of the British Government. Not so would the rule of law be

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<sup>1</sup> I am greatly indebted to John Sorabji for his assistance in preparing this address.

raised and strengthened on the international as well as upon the municipal plane; not so would future generations realize that right is not always on the side of the big battalions; not so would the world be made aware that the waging of aggressive war is not only a dangerous venture but a criminal one.<sup>2</sup>

Sir Hartley Shawcross delivered that as part of his opening speech as the Chief Prosecutor for Great Britain and Northern Ireland at the Nuremburg Trials.

4. Many points can be taken from this short extract, as they can from the rest of Sir Hartley's speech. I want to focus on one particular point he made: that the view of the British Government was to act in a way that strengthened the rule of law both at home and abroad. Just as Lord Atkin in his famous dissent in *Liversidge v Anderson* had rightly made clear that even during war laws did not fall silent,<sup>3</sup> Shawcross emphasised how in war's aftermath we could not afford to permit law to fall silent.
5. In one sense Nuremburg was a test of our credentials: did we believe in the rule of law or not? Would we start to rebuild our national and international communities on a proper basis? Or would we treat the rule of law with a similar disdain that those on trial at Nuremburg had treated it and thereafter build on a poisoned inheritance? For the British Government and Sir Hartley there was but one answer: Lord Atkin's. We live in a world governed by the rule of law both in times of war and peace. Such a world has no place for so-called victor's justice. We build on firm, principled foundations or we don't build at all.
6. Given this it surely must have surprised no one when, in 1957, Sir Hartley helped found *Justice*, going on to be its first chairman. It must equally have surprised no one that he would go on to described its aim being to seek to advance the fair administration of justice, to persuade governments and other policy makers of the utility of *Justice's* views through the strength of legal research and reasoned argument. We persuade because we have the best arguments not because we have the "big battalions".
7. That was nearly 60 years ago. The world has changed significantly since then. Most recently and probably of the greatest significance has been a change to the role of the State and the expenditure it is prepared to make. The one thing that however has remained constant is the need to ensure that we build society, nationally and internationally, consistently with a commitment to the rule of law.

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<sup>2</sup> H. Shawcross, Nuremburg Trial Proceedings Volume 3, Tuesday, 4 December 1945, Morning Session reproduced by the Avalon Project, Yale Law School <http://avalon.law.yale.edu/imt/12-04-45.asp>.

<sup>3</sup> [1942] AC 206 at 244.

8. The question, in this changed and changing world, for *Justice* – for us all – is how are we to reshape our system of justice so that it can best uphold the rule of law? And how are we to reshape our justice system so that it can properly and fairly administer justice according to law at a cost that the State is prepared to fund and which litigants can afford? It is these two questions on which I want to focus in this address. In particular, I want to do so by reference to two discrete, although perhaps not entirely discrete, issues in relation to reform in an age of retrenchment.

### **Justice reform: the general approach**

9. We live in times where, so it seems now and for the foreseeable future, the State is undergoing, a period of significant retrenchment. The political parties are agreed that the budget deficit must be reduced; the cutback on government expenditure is to continue for the foreseeable future. It was an approach born in times of austerity, but there is no indication that there will ever be a return to times of abundance in the provision of funding by the State.
10. Far from being immune, our system of justice is, unlike some areas of State expenditure, unprotected from the retrenchment. It has been and will continue to be one of the areas where State expenditure will continue to be cut. It has undergone cuts before, but this time is very, very different. The magnitude of the cuts will, it is now thought, be something in the order of at least a third in real terms of the 2010 expenditure not the two or three per cent of the past years. Moreover, the anticipation is that the cuts will be permanent and not merely whilst times of austerity are with us.
11. Some would say that with such dramatic reduction, our system will break. But that cannot be permitted. If it breaks we lose more than courts, tribunals, lawyers, and judges. We lose our ability to function as a liberal democracy capable of prospering on the world stage, whilst securing the rule of law and prosperity at home.
12. Our task is therefore to ensure that we uphold the rule of law by maintaining the fair and impartial administration of justice at a cost the State and litigants are prepared or able to meet. We can only do that by radically examining how we recast the justice system so that it is equally if not more efficient, and able to carry out its constitutional function. There is a degree of novelty about the present situation. That novelty is in terms of what is driving

reform and in the necessity for reform, not in terms of the scale of reform that may need to be undertaken. There is no novelty in truly great, and in some ways, radical reform.

13. But will not all of this take a long time? The great 19<sup>th</sup> Century reforms, which saw the creation of the High Court and Court of Appeal, were the ultimate product of a fifty year period of almost constant reorganisation. No aspect of the justice system was untouched. The legal profession saw the death of the Sergeants-at-Law and the creation of the modern solicitor from the merger of solicitors, attorneys and proctors. Monopolies were broken when the Court of Common Pleas was opened up to barristers for the first time. The great common law and equity courts were given the same powers in order to reduce litigation costs and delays, and eliminate the possibility of the same claim being pursued in two different courts with a different result being arrived at the end of each process. And when that failed to solve the problem, nearly 900 years of history was swept aside. The Courts of Common Pleas, Queen's Bench and Exchequer along with the High Court of Chancery were consigned to the history books as they became the, then, new Supreme Court of England and Wales. The status quo undermined the justice system's ability to secure justice. The impetus for reform was not then a financial one.
14. Today however we are faced with the need to reform which is necessitated by the retrenchment of the State. That is not to say that aspects of the justice system do not also need to be reformed because the status quo is no longer up to the job. Antiquated court infrastructure, specifically courts' IT, has for a long time fallen short of what is required in any modern system. Given developments in computer, internet and general IT over the last 10 years, significant work needs to be done. Such work cannot however simply be carried out in isolation. IT changes, such as those that could bring virtual preliminary hearings – the logical extension of the telephone case management conference – will need to be mirrored by procedural reforms. They will equally have an impact on working practices, both for the legal profession and the Judiciary. What might be perceived as a simple case of an IT upgrade, is anything but. It is one aspect of our system and the necessity for reform.
15. How then should we approach reform today? The starting point is that we *must* be radical in our thinking. Too often in the past there has been an inevitable and not necessarily wrong tendency towards conservatism. The great reforms of the 1870s, I mentioned earlier, came after 50 years of more limited, more cautious reform. It was only after the failure of those early attempts, that the piecemeal attempts at reform could culminate in truly radical reform.

But now we simply do not have that luxury of time. The financial imperative that is part and parcel of the recasting of the State does not give us the time to take such an approach.

### **The role of *Justice***

16. This is where *Justice*, this organisation, enters the picture.
17. The type of reform needed that will uphold the rule of law by enabling justice to be delivered fairly and impartially in the fundamentally changed financial circumstances requires fundamental re-thinking of our processes and procedures. There are great advantages to such thinking being done initially by a body independent of the institutions of the State. Such independent bodies have the freedom to do that thinking which others may think too dangerous.
18. I have therefore specifically encouraged the work of the Bingham Centre for the Rule of Law in its recent report on the Administrative Court; and the work of the New Economics Foundation, the Centre for Justice Innovation and the Criminal Justice Alliance in examining the best way of dealing with low level offending. I also welcome the recent report of the Policy Exchange on “A new vision for summary justice”.
19. However, when I say I had specifically encouraged work or welcomed a report, I do not say that I agree with every word of what is put forward. What I welcome is innovative and creative thinking. Some of what is put forward will be for political decision; on that it would be inappropriate for judges to express a view. Some of it will be for decision by the Judiciary working with the Executive. Some of it will be for the Judiciary alone to consider. What is important is that these creative ideas are being brought forward and can be considered, particularly by reference to the contribution that such ideas can make to delivering justice fairly and impartially in the changed financial circumstances.
20. But what specifically of the role of *Justice*? *Justice* has two particular advantages. First, when it was founded, the preamble to its constitution laid down that there must be a fair representation of the three political parties on its governing council. This has continued to this day – the chair and two vice chairs are from each party. This is a great advantage. Political parties will no doubt differ on several issues relating to justice, but there are many reforms that can and must be made that should surely be achieved by political consensus. At a time when we need to re-shape our system of justice to enable it to provide fair and

impartial justice, we need as great a degree of consensus as is possible that will greatly assist in achieving successful reform.

21. Second *Justice* can draw on the expertise of all members of the legal community – not merely the experienced but also the young. I very much hope the young as well as the not so young will be fully engaged in the endeavours ahead, as they have an enormous contribution to make.
22. One of the projects that I understand it is in the process of establishing focuses on how we deliver justice in an age of austerity. It is to be chaired by Sir Stanley Burnton. It is perhaps, I hope, the first of a number of such projects, which will look at developing practical and innovative proposals concerning the effective development of the justice system. It strikes me that this is exactly what we need – a focused study of the justice system carried out by experts from a diverse range of fields without, what might be described as the dead hand of tradition, holding them back from making bold recommendations.
23. By bold I don't mean to sound like Sir Humphrey Appleby. On the contrary I want to emphasise how a project run by *Justice* can draw on wide experience both national and international, from a wide and diverse range of sources from within and outside the legal field, benefit from the cross-fertilization of ideas that that brings, and – of course – - carry out proper evidence-based research. As an independent body, it can come up with and evaluate ideas and proposals that stimulate debate, that go further than those who are wholly or largely within the justice system might consider. It is the bold who properly set the boundaries of the possible. I hope that in this exercise *Justice* will be amongst – indeed will be leading – the bold.
24. Let me then turn to the two specific areas I wish to address. First, the need to make the legal process simpler in Civil and Family courts. This is a part of the task entrusted to Sir Stanley.

#### *Simplifying process*

25. One of the immediate consequences of the retrenchment in State expenditure has been the reduction in the availability of legal aid in family and civil cases. This together with the relatively high cost of legal fees charged by lawyers has resulted in a significant increase in the number of litigants in person. Suggestions have therefore been made by, for instance, the Judicial Working Group on Litigants in Person, that serious consideration should be given to introducing a more inquisitorial form of process in civil proceedings where both or at least

one party is unrepresented.<sup>4</sup> In the family courts a similar increase in litigants in person, particularly in disputes over contact or custody, have shown that traditional procedures are not best suited to a dispute between father and mother over a child when inevitably matters that have caused emotional stress are raised by them in court as adversaries in person rather than being raised by lawyers acting for them.

26. This is not the first time since the 1870 reforms that the idea has been floated that we move towards a more inquisitorial form of process. In the early 1950s it was looked at by Lord Evershed MR and his committee, while they carried out the Woolf or Jackson review of the day. His committee had the luxury of time to consider it and very many other issues. They started work in 1947 and their final report was not published until 1953. They were supposed to think the unthinkable. No doubt they would have been told, in post-war terms, to indulge in some blue-sky thinking, to shed the inhibitions that come from remaining in the box, while pushing the envelope towards a thought shower.

27. Needless to say the Evershed Committee did none of those things. Nor did it do the far-more mundane thing of considering the question of inquisitoriality, its merits, consequences for the rest of the justice system, or its drawbacks in any detail. They simply ruled it out. They did this on two grounds. First, it was outside the terms of reference. Secondly, having looked at it briefly in the context of carrying out some comparative work on how a number of continental justice systems operated, they were sure it couldn't simply be picked up and adopted over here. It was like other aspects of those systems, as they put it, in "no sense adapted" to our way of doing things.<sup>5</sup>

28. The Evershed Committee was at pains to point out that it was not simply a group of insiders comprised of lawyers and judges. It emphasised how it also included lay people, no doubt to help it come up with a more rounded view. That being said, it noted how the lay people were guided by what the legal members of the Committee said when it came to the boundaries of the possible. It is interesting to think what proposals might have come forward if they had not been guided in this way; if those immersed in the system had not set the effective parameters of debate.

29. Returning to the task in 2014, we must do what the Evershed Committee did not. We have to keep an open mind even on radical options. For example, to some a change to a more

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<sup>4</sup> [http://www.Judiciary.gov.uk/Resources/JCO/Documents/Reports/lip\\_2013.pdf](http://www.Judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf) at 33.

<sup>5</sup> Evershed Final at 12.

inquisitorial procedure seems like the obvious or the only solution to the present situation we find ourselves in with the increase in litigants-in-person and the need to both secure a fair trial for all whilst doing so within limited and reducing resources that have to be distributed equitably amongst all those who need to resort to the courts. It might be said by them that to attach to it the label of “inquisitorial” was doing it a disservice, as it was really little more than the active interventionism characteristic of much pre-trial procedure, case and trial management. But I think it is right to refer to it as inquisitorial, because the essence of the change would be a much greater degree of inquiry by the judge into the evidence being brought forward.

30. Others take the same view as the Evershed Committee: it is a form of process alien to our adversarial tradition and cannot properly be accommodated within it.
31. These positions need careful consideration. Questions such as how is the justice system to operate an inquisitorial process effectively need to be considered. What effect would that have on the ability to give other cases their fair share of the court’s time and resources? What consequences would it bring to, for instance, the efficient use of judicial time? Would an increased workload mean we would need more judges, or need to introduce a new cadre of junior judges? What effect would it have on the structure of our courts, and courts administration? What would be its cost?
32. These questions can all be multiplied, not least when we they have to be considered in a wider context. Continuing reform of the legal profession as a practical consequence of the 2007 Legal Services Act, amongst other things. The nature of and consequences of modern IT provision to the courts, on court processes, not least the management of cases, and on legal practices. Simplification of procedure for lower value cases and its consequences. All these, and many more issues, are interrelated. We cannot look at potential options for reform in isolation.
33. If we are to reshape our justice system, these issues will need to be given proper consideration. A reshaped *Justice* seems to me an ideal body to lead that work. I am sure that Sir Stanley Burnton will, with expert advice drawn from amongst your membership, come up with a number of practical, well-thought out, reform recommendations. I look forward very much to the report.



### *Criminal Justice*

34. The focus so far has been on issues that relate to civil and family justice. While it may be outside the present scope of your work on reform necessitated by retrenchment, the criminal justice system also needs to be placed under a degree of scrutiny. As was announced last Thursday 27 February, I have asked Sir Brian Leveson, President of the Queen's Bench Division, to examine ways of streamlining criminal procedure and to report initially on that within nine months. But are there other aspects that need inquiry and require the benefit of looking at issues again. I will take two by way of example.

### *Fraud investigations and trials*

35. May I take fraud trials first. Thirty years ago, I was a member of a *Justice* Committee chaired by Beryl Cooper QC. The Committee considered fraud trials at the time the Government had announced the establishment of the Committee chaired by Lord Roskill to look at the way in which fraud was prosecuted. Although a practitioner at the commercial bar, I saw as much if not more fraud than would a person practising at the criminal bar; I had also been heavily engaged in the legal issues arising out of a series of scandals then involving the insurance market. Many of those scandals involved conduct where the allegations were of serious criminality. Prosecutions were few and those that were brought failed.

36. Forty-five recommendations were made by us – many of them practical, such as those directed at improving the quality of investigations and the trial process. We strongly urged the continuation of trial by jury. However, when Lord Roskill reported in 1986, amongst the many recommendations was a recommendation that consideration be given to trial by judge alone or by judge and assessors.

37. In the Lord Merlyn Rees lecture I gave at the University of South Wales in 2009, my conclusion was that despite all that had been done since the Roskill Report in 1986, we still had very serious problems. Indeed Lord MacDonal QC had a month or two before my lecture, observed that “our system for regulating markets and for prosecuting market crime is completely broken”. I touched on some of the issues, including the real difficulties with disclosure and the question of the mode of trial – jury, judge alone, a tribunal of a judge and two or more laymen, judge and assessors. Since then there have been further changes, including the recent introduction of Deferred Prosecution Agreements and the many attempts at improving the process of disclosure, but there are still major problems in disclosure that seem to indicate that the issues are getting worse rather than improving.

38. Is it not time that *Justice* looked at these issues again? Thirty years is a very long time since the committee of which I was a member. Circumstances have changed and so may have views. Fraud investigations and trials are still far too slow and immensely expensive; not enough prosecutions are brought despite the reenergised Serious Fraud Office under David Green QC. It is vital for the health of our economy and the pre-eminence of London that those who commit financial fraud or engage in bribery and corruption are tried in a criminal courts and severely punished. Should we not look radically again at disclosure and the mode of trial?
39. I will not express my own views on either subject. It would not be right to do so until there is a carefully considered report which can form the basis of a considered view. I would simply say that reforming at least one of these would make a significant difference and ensure that on the resources available, there would be rigorous pursuit of more prosecutions for fraud, particularly fraud in the financial markets, and for bribery and corruption.

*The less serious element of Crown Court work*

40. We need to consider too the allocation of work to the different Criminal Courts. At the moment the Crown Court deals with a wide range of offences from the most serious to what might be described as the much less serious – fights where the injuries are not overly severe and dishonesty where the monetary value is small.
41. In 2001 Sir Robin Auld in his comprehensive review of the Criminal Courts recommended the creation of an intermediate court between the Magistrates' Courts and the Crown Court to deal with the lower-end of the offences that are triable in the Crown Court.<sup>6</sup> Sir Robin suggested such a court be comprised usually of a District Judge and two magistrates. This proposal was not pursued. It was radical, but it was not the time for it.
42. The altering of the boundaries of cases where trial by jury is available is an issue on which, like the mode of trial for fraud, there are very strongly held views. Circumstances have changed: there is far less work for magistrates to do, and the Crown Court is heavily overburdened by a significant proportion of its work relating to serious sexual offences. Moreover, it is becoming apparent that properly reasoned judgments which can be scrutinised on appeal provide a real safeguard.
43. Surely it is time to consider this issue again given the financial circumstances in which we are now placed. Again I will not express any view; evidence and analysis are needed. The time for a view is then. I would hope that alternatives are considered such as the possible creation

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<sup>6</sup> Review of the Criminal Courts of England and Wales; chapter 7, paragraphs 21-35.

of two forms of criminal procedure applicable in the Crown Court, analogous in intent, if not in design, to the fast and multi-track in civil procedure?

## Conclusion

44. These are just some of the many ideas that we must consider if we are to enable our courts to maintain the rule of law by providing fair and impartial justice at a cost that is within the funds the State will provide and citizens can afford.

45. May I conclude by looking back to Sir Hartley Shawcross? In one of his other famous utterances, and one I believe he lived to regret, while Attorney-General he said during a Parliamentary debate:

We are the masters at the moment, and not only at the moment, but for a very long time to come. . . .<sup>7</sup>

He was talking about the recently elected 1945 Labour Government. It was perhaps a more modern version of a sentiment he rejected in his opening speech at Nuremberg, with which I started this address. It can be seen as a modern day take on *Vae Victis* – woe to the vanquished.

46. If that was the case, then perhaps he might have been better – and perhaps not then come to regret as he did – if he had also thought of the rest of what had been that opening Statement at Nuremberg. If he had dwelt on the idea that in talking of masters, our proper master is Justice. And that it is not only judges and lawyers who are the servants of Justice, but that all who live in countries committed to the rule of law, are such servants.

47. If we are to secure Justice's mastery, not just at this moment but for a very long time to come, then we all need to consider how best we can reshape the justice system and how you – members of *Justice* – can reshape it so that it can provide detailed, well-thought out and practical proposals setting out how that can and should be done. I am sure that you will do so, and that the projects you are to start work upon will do just that and we – and our commitment to Justice's mastery – will be all the better for it.

48. Let us therefore all wish *Justice* the greatest success in its new endeavours.

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<sup>7</sup> HC Deb 02 April 1946 vol 421 cc1151 ([http://hansard.millbanksystems.com/commons/1946/apr/02/trade-disputes-and-trade-unions-bill#S5CV0421P0\\_19460402\\_HOC\\_358](http://hansard.millbanksystems.com/commons/1946/apr/02/trade-disputes-and-trade-unions-bill#S5CV0421P0_19460402_HOC_358)) at cc1212 – 1214.

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