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Anthony Clarke

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# Civil Justice: The Importance of the Rule of Law<sup>†</sup>

SIR ANTHONY CLARKE, MASTER OF THE ROLLS\*

## I. Introduction

It gives me great pleasure to be here this morning at the opening of your 2007 Conference. I can see that I am just a sort of inadequate warm up man sandwiched between the great and the good in the form of the Lord Chief Justice who addressed you earlier this morning and the many that are to follow during the rest of the week. I see from the programme that I am, for instance, being followed by Lord Goldsmith later in the day, that the Honourable Marilyn Kaman (of the Minnesota District Court) is to address you tomorrow as will Lord Falconer, while Friday will be adorned by Lord Bingham and the President of the International Court of Justice, Judge Rosalyn Higgins. With such an array of speakers I am sure that the next few days will prove to be both enjoyable and enlightening.

It is now two years since I was appointed Master of the Rolls and Head of Civil Justice for England and Wales. Before that I was an ordinary member of the Court of Appeal for approximately seven years. During this time I have seen it and the civil courts in general undergo a considerable degree of change, both organisationally and in respect of their personnel. The most significant of those changes have come about as a result of the, by now, well known Woolf Reforms. Those reforms ushered in a number of far-reaching changes to the civil litigation process, some of which you will be familiar with, such as active case management, some of which you may not be too familiar with, such as the introduction into our rules of court of an explicit overarching principle—the overriding objective—the aim of which is to guide court and litigant behaviour so as to enable disputes to be resolved justly through the use of proportionate time and at proportionate expense. The aim of those reforms, and I have to say numerous similar reforms that have preceded them over the last two hundred or so years, is to render the litigation process simpler, less costly and less time consuming. And thereby to increase access to justice.

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<sup>†</sup> This speech was delivered to the American Bar Association Conference in London, 3 October 2007.

\* Sir Anthony Clarke read economics and law at King's College, Cambridge and was called to the Bar in 1965. He was appointed Queen's Counsel in 1979 and became a High Court Judge in the Queen's Bench Division in 1993 sitting as the Admiralty Judge. He was appointed as a Lord Justice of Appeal in 1998 and succeeded Lord Phillips in 2005 as Master of the Rolls and Head of Civil Justice in England and Wales.

These concerns are not unique to England and Wales. Fifty years ago, Associate Justice of the Supreme Court William Brennan in an address to the New York State Bar Association had this to say about civil justice reforms that were then being implemented in New Jersey:

*“...all of us who have felt somewhat lonely. . . (in the pursuit of reform). . . welcome enthusiastically. . . evidence of the determination of the leaders of our profession to come to grips with and rout the evils of delay and inefficiency which have too long marred the administration of justice in every jurisdiction of our land.*

*But there is much hard and arduous work to be done. And it must largely be done separately by the different jurisdictions because the job of putting any jurisdiction's house in order is the job of that jurisdiction. We of New Jersey can attest that it is a hard and difficult job but we can say with equal conviction that it is a job that can be done, given only a determination by the profession on and off the bench to do it.”<sup>1</sup>*

I can say with some certainty that loneliness is most definitely not a state of mind that the pursuer of civil justice reform can experience today. That however is the only point of dissent I would have with Justice Brennan. Delay, inefficiency and the disproportionate costs of litigation costs, which they help to engender, remain as much a problem now as they did in the 1950s or, for that matter, in the 1850s when David Dudley Field completed his codification of New York's civil procedure or at any other time in the past. Civil justice reform remains a hard and arduous task. It still requires the judiciary and the legal profession to act with determination and conviction. It is a job which in England we have been pursuing with as much vigour as we can muster since the implementation of the Woolf Reforms in 1999.<sup>2</sup> Today we must all have in the forefront of our minds the question how best to ensure that our justice systems are not marred by the evils of delay, inefficiency and excess cost. We must all take steps to ensure that access to justice is neither unnecessarily nor unjustifiably impaired. We must all take steps to ensure that our civil justice systems do not, as Bentham put it in 1808, become open to *‘all but a favoured few, to whom a golden ticket opens the way.’*<sup>3</sup>

This prompts the questions: Why must we take these steps? Why is this important?

## II. The Importance of Civil Justice

It strikes me that the importance of an effective, efficient and readily accessible civil justice system is something which cannot be underestimated. It is to my mind one of the single most important elements of any modern, just and democratic society.

Effective civil justice is the means by which citizens are able to uphold their substantive civil rights against other citizens. More importantly, perhaps, in modern times, it enables citizens to assert their substantive civil rights against the State itself. The ability to assert

1. William J Brennan JR, Associate Justice of the Supreme Court of the United States of America, *‘Pretrial Conferences’*, [21] Albany Law Review 2 (1957) at 2–3.

2. Lord Woolf MR, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995); *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996).

3. Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh), *Letters on Scotch Reform* Vol. 5 at 47.

our—and I stress *our* because we are all citizens after all—legal rights against the State effectively is the means by which we ensure, to paraphrase John Locke, that law does not end and tyranny begin.<sup>4</sup> Looked at in this way it is to my mind obvious that civil justice systems play a truly essential role in furthering the Rule of Law. Indeed, as Lord Bingham put it in 2006, in a lecture given to the Centre for Public Law at Cambridge University, effective access to justice lies at the heart of the concept of the Rule of Law. He put it this way:

*“The core of the . . . principle [of the Rule of Law] is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.”*<sup>5</sup>

While Lord Bingham accepts that this principle is subject to qualification and exception it stresses as a fundamental aspect of the rule of the law the ability to be bound by and benefit from laws. Absent an effective civil justice system substantive civil laws are to paraphrase Hamlet, no more than ‘*words, words, words.*’<sup>6</sup> Absent an effective civil justice system we are left with the Rule of Law as at best a pious hope—or rather as politicians are apt to say, an aspiration—and at worst a tyranny rather than something concrete of which we can all be proud and under which can live freely and securely.

With these thoughts in mind it is clear why we must all work as hard as we, judges and lawyers alike, possibly can to ensure that our civil justice systems are readily accessible and effective and why we must never return to a position where some latter-day Jeremy Bentham can justly say of our civil justice systems that:

*“Under English. . . law, for getting through (the difficulties inherent in the civil justice system). . . , a very simple rule suffices:—right to justice depends upon opulence. The law is a lottery: have you money enough for a ticket? Down with your money and take your chance. Does money run short with you? Lie still and be ruined. It was not for you that justice. . . was made.”*<sup>7</sup>

In this the opening decade of the 21st Century it is becoming something of a commonplace to describe the civil justice system as a public consumer service, in which litigants are consumers, and the courts are service-providers. The language of what Phillip Bobbitt has described as the ‘*market-state*’ is perhaps becoming all-pervasive.<sup>8</sup> Lord Hoffman gave expression to this recently, when assessing whether a claim should be permitted to continue despite the cost implications for the state:

*“42). . . It is not the case that the administration of justice, alone among the services provided by the state, is exempt from any considerations of cost. It is obvious that a trial of this action, . . . would be an enormous and expensive undertaking. Your Lordships were told that the costs incurred in these proceedings by the claimant and other residents of Bangladesh who wish*

4. John Locke, Second Treatise of Government, Book II, Chapter XVIII, Section 202: “*Where-ever law ends, tyranny begins.*”

5. Lord Bingham, *The Rule of Law*, 6th David Williams Annual Lecture, Centre for Public Law, Cambridge University ([http://cpl.law.cam.ac.uk/past\\_activities/the\\_rule\\_of\\_law\\_text\\_transcript.php](http://cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php)).

6. Shakespeare, *Hamlet*, Act 2, Scene 2.

7. Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh), An Introductory View of the Rationale of Judicial Evidence; for the use of non-lawyers as well as lawyers Vol. 6 at 101.

8. Bobbitt, *The Shield of Achilles*, (2003) (Penguin).

*to bring similar actions, at the expense of United Kingdom public funds, already exceed £380,000. That takes no account of the costs incurred, also at the public expense, by NERC. That is a factor which, however unpalatable it may be to those who think that justice is priceless, must be taken into account. And justice to the defendant requires one to have regard to the burden which a long and complicated trial would impose upon NERC. Speaking for myself, I think that even if the resources of the state and NERC were infinite, it would still be wrong for this case to proceed to trial. But when one considers the scale and cost of a trial, the case for stopping the proceedings now appears to me to be overwhelming.”<sup>9</sup>*

I would like to assure you that it is not mere sycophancy that led me to include these words of Lord Hoffmann, since he uttered them while disagreeing with one of my decisions.

We must take care not to be bewitched by such language. It is perhaps all too easy to fall into the trap of thinking that the language of the market, of resource considerations is, as Lord Hoffman says some would put it, ‘unpalatable.’ To take account of such resource considerations might be thought by some to be the beginning of a slippery slope on which the State begins slowly to disengage itself from providing proper provision for the civil justice system. Like Lord Hoffmann, I do not agree.

The civil justice system is a public service, an essential public service which ensures that the lifeblood of democracy flows strong. Given this fundamentally important role it is essential that as a service it operates efficiently and fairly. An efficient and fairly run service is more likely than not to be an effective one. Professor Zuckerman, of Oxford University, gave expression to this idea recently in the following way:

*“The right of access to court does not, however, entitle litigants to demand the best possible law enforcement process regardless of cost, any more than they are entitled to demand unlimited health support or boundless educational facilities. The only reasonable demand that members of the community can make with respect to any public service is that its funding should be commensurate with available public resources and with the importance of the benefits that it has to deliver. In addition, members of the community have a right to expect that, within available resources, the service should provide adequate benefits to the community.*

*The test of whether a given public service is adequate is fairly straightforward. A public service is adequate if it is effective, efficient and fair. A service is effective if it meets the reasonable expectations of the community, be they appropriate health services, a satisfactory education system or, indeed, adequate court assistance for the enforcement of rights. A service is efficient if its resources are used to maximise benefit output and are not unnecessarily wasted on unproductive activities. A service is fair if the resources available to it are justly distributed between those entitled to the service, whether their needs are present or merely contingent.*

*The requirements of effectiveness, efficiency and fairness are easily translated to the provision of court dispute resolution. Court adjudication is effective if it determines claims with reasonable accuracy, within a reasonable time, and with proportionate investment of litigant and public resources. Court adjudication is efficient if public and litigant resources are employed to maximise effectiveness and are not wasted unnecessarily. Lastly, court adjudication is fair if*

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9. *Sutradhar v Natural Environment Research Council* [2006] UKHL 33; [2006] 4 ALL ER 490 at [42].

*the system ensures that its resources and facilities are justly distributed between all litigants seeking court help and between present and future litigants.*"<sup>10</sup>

What are the practical implications of this for those of us who are involved in the civil justice system? Let me give you some examples. There are, of course, many more.

First, it requires that we must ensure that, as judges, lawyers or litigants, we no longer conceive of the justice system in passive terms. This is undoubtedly easier for those who practise in America, with your longer tradition of active judicial case management. This is something which we only properly introduced here with the Woolf Reforms, although we had made a number of abortive attempts at introducing it previously.

Secondly, it requires us to organise and utilise our resources as best we can. Our court structures must be rationally organised, properly staffed and run efficiently. We must always have in mind changing social needs. We must not find ourselves as we did in the mid-19th Century when an antiquated court structure found itself unable to cope with a rapidly industrialised and industrialising society which gave rise to novel forms of litigation in ever increasing quantities, failing to reform our court structures and processes in light of social changes. In the internet age we must make sure that our civil justice system does not replicate the problems of that time. We must make sure that it is capable of reforming, and does reform, its structures and processes in tandem with wider societal changes.

This is the national picture. It can however be broadened out. In today's global village we can no longer live as islands unto ourselves.<sup>11</sup> The continued growth of our ever-increasing globalised economy, of multi-national corporations, of the free movement of capital and services, of financial markets, of private international law and ever more common standards of human rights have an important consequence for us all. We must all ensure in this increasingly complex and interconnected world that our national civil justice systems are able effectively to respond to disputes which cross national boundaries.

Equally, we must not miss opportunities to learn from each other. Events such as this conference are an excellent opportunity for the exchange of ideas. Judicial exchanges serve the same purpose. The growth of multi-national law firms ought equally to ensure that ever more opportunities to learn from each other, and other countries' traditions and processes, arise. We ourselves have recently taken the step of establishing a Comparative Law Committee of our Civil Justice Council, with the very aim of facilitating such learning.

Finally, we must ensure that adequate means are available for litigants to obtain access to justice. A civil justice system which works efficiently, and distributes its resources fairly amongst those who walk through its doors is one thing. It is another thing entirely to ensure that all those who need to be able to walk through its doors. An efficient and fairly run system certainly encourages effective access to justice. But it can only encourage it. Such encouragement for a large number of people is not sufficient. Effective funding arrangements, whether they are legal aid schemes, supplementary legal aid schemes, or conditional or contingency fee arrangements, must be in place so that access to justice is denied to none purely on the basis of cost. The problem of fair and effective funding

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10. Zuckerman, *Civil Litigation: A Public Service for the Enforcement of Civil Rights*, (2007) (26) *Civil Justice Quarterly* 1 at [3].

11. *Pace* John Donne, *Meditation XVII, Devotions upon Emergent Occasions*.

arrangements is one we are currently grappling with here; it is perhaps an area where we can learn lessons from across the Atlantic.

I had intended to include a paragraph, based on Lord Denning's dictum that England is a good forum to shop in, but that would be to repeat an old-fashioned nationalistic view of dispute resolution, whereas we must all co-operate to provide the most efficient, just and cost-effective system for the resolution of international as well as domestic disputes.

### III. Conclusion

I would like to leave you with two thoughts: both of which have echoed down through the centuries and which are as relevant now as they were when they first found expression. The first is from one of our former Chief Justices. In 1702 Holt CJ stated in the case of *Asbby v White*, that: "*where there is a right there is a remedy.*"<sup>12</sup> *Ibi jus ubi remedium*. If we are to ensure that that remains true we must ensure that our civil justice systems work are properly available to all those who need to resort to them in order to assert their rights and are properly able to provide effective remedies. If we fail to do so, we are left with the thought that Ulpian's imprecation from Justinian's Institutes, that '*justice is the constant and perpetual wish to render everyone his due*'<sup>13</sup>, is just that: a perpetual wish rather than a concrete reality. It is our duty as judges, as lawyers, as citizens of States which believe in the Rule of Law to ensure justice is a concrete reality.

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12. *Asbby v White* (1702) 2 Ld Ray. 938.

13. Ulpian, *Justinian's Institutes*, (Cornell University Press) (1987), Book 1.