

EJTN Human and Fundamental Rights Project with the Max Planck Institute for Social Anthropology

Keynote Address - 'Diversity and Judgecraft' 'Decency in Human Affairs'

Thursday 19th November 2020

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John Gray, one of the great public policy thinkers of recent years, warned our generation to have an understanding of the “human beings who are left behind in the grand march of progress”. He was commenting on the work of a great Oxford philosopher, Isaiah Berlin, and *his* work on value pluralism. Berlin said:

“there are many different ends that men may seek, and still be fully rational... intercommunication between cultures in time and space is possible only because what makes men human is common to them and acts as a bridge between them. But our values are ours, and theirs are theirs.”

Gray went further, in words that ought to ring true for decision makers during this pandemic:

“Progress of a kind remains possible. Whenever human violence is curbed and power tamed, the weak are sheltered, and minorities can live without fear. When the hungry are fed and the poor given succour, some genuine advance has been made. In effect, this is progress in securing the moral minimum; the uneasy equilibrium that makes for decency in human affairs, which is the true upshot of Berlin’s understanding of value-conflict”

This is the third talk in the series sponsored by the European Judicial Training Network through their Human and Fundamental Rights Project, and the Max Planck Institute for Social Anthropology, in Halle, Germany. I am very grateful to them and their directors for the opportunity to speak again at such an important gathering of judges.

The two previous talks were given face to face in glorious historic surroundings; the first in Wiesbaden, and the second in Utrecht. Today was intended to be in Vienna. We will return to the pleasure of a real social discourse as soon as it is safe to do so. The texts of the talks I gave are available to you and were given from the perspective of a Head of Jurisdiction, one of the five Presidents and Chief Justices in the United Kingdom. In September this year, I retired from that

office and handed my 5,500 judicial office holders to my successor, with my fondest best wishes. The glorious surroundings from where I give this talk are in the University of Oxford, where I am now the Master of Pembroke College, founded in 1624 by King James I. If you ever have the opportunity to come and share our scholarship, you will be very welcome.

Let me sketch out my three themes. Inevitably, and deliberately, two come from our previous discussions, but the third is new and arises out of our important experience in delivering justice during a state of emergency.

In Wiesbaden in 2018, I identified the social context of judging as a constitutional function based in principle. I argued that for a justice system to be true to its principles it must have the means to understand the social attitudes and perspectives of the communities that use it. I also argued that the reasonable adjustments to procedure that the judiciary permit and the language that we use are an important part of our civic accountability and a means of ensuring equal access to justice by different communities of people. The aim is to remove barriers to comprehension and trust by protecting the autonomy of the individual without giving unfair advantage over others. I identified reasonable adjustments to procedure in our case law as an important way forward to establish fairness for all, not just those who articulate an educated or majority opinion, and how good practice can be established by judges within a justice system by relying on empirically validated research and expert evidence.

In Utrecht last year, I considered the strategy of the rule of law, which involves the creation and governance of power by a delicate balance of components. That includes the attainment of order out of conflict; the balance of opposites; and the aspirations of people whose ideas, beliefs, values and stories must be respected if they are to have trust and confidence in a justice system. I identified examples in our case law of the court's approach to irreconcilable conflicts and values. One of the insights which we discussed last year is that whenever possible, in order to achieve both fair process and respect, judges should take account of contextual motivations for peoples' behaviours, so that we are better able to communicate the law's purposes. In other words, cultural differences should not deprive a person of the safeguards of the rule of law, and the law should acknowledge that society must "work to overcome the ultimatum of either your culture, or your rights".

The principles which I enunciated are more easily expressed, and they include:

- The obligation to secure open and effective access to justice independently of, but also collaboratively with, the executive and the legislature;
- The integrity of the approach of an impartial, independent judiciary to issues of belief, custom, and culture, where those values and differences are not proscribed by law; and
- The governance of justice, by which through our leadership and good practice we deliver and administer justice for the public benefit.

I could not have guessed one year ago that questions of governance would become so important this year. The pandemic has differentially affected our communities so that deprivation, vulnerability, ethnicity and age, among other characteristics, some of which are protected characteristics, have influenced the impact of the pandemic on individuals and hence their ability to access healthcare, education, social and welfare provision and justice. That tends to divide us rather than bring us together and the consequence will have been both conflict and a narrowing of the focus of diversity in fairness: a 'one size fits all approach'. At the very time that a justice system needed to take a strategic approach it became diminished in its importance. Justice systems around the world responded in very different ways. Sadly, not all of them were able to strike a balance between the imperatives of the states of emergency that existed and the need of our users to access an urgent remedy. That at least raises a question about what it is that judges must be alert to in a state of emergency to ensure that decency in human affairs is acknowledged in order to safeguard the rule of law.

That is the third limb of my talk today. What use are our individual decisions, no matter how compelling their intellectual or jurisprudential content, if we have not at the same time considered the impact of delay, austerity, and the unavailability of proportionate forms of remedy or redress during a state of emergency, in order to ensure that our justice systems do not become ineffective or inefficient?

It is sadly the case that access to justice is compromised by delay; for example, by allowing mounting backlogs of cases to develop, or by the adverse consequences for the user if courts do not prioritise them for urgent relief. Priorities that may need to be considered include mechanisms for release from custody or from mental health detention; the amelioration of penalties that force individuals and businesses into insolvency; employment law remedies against both the state and big business, in particular when the employee's financial existence is even more marginal than usual; and family justice priorities, including public safeguards in child protection and welfare questions on relationship breakdown, access to special education, higher education and

healthcare. Each of these, and many more, are issues exacerbated during states of emergency, when governments have to control by decree, and the obligation on both the judiciary and the legislature is arguably enhanced at the very time when lockdown fundamentally affects access to justice. Courts and tribunals may be physically closed, the ability of the judiciary to obtain access to records, in particular paper records without digital reproduction may be very limited and forms of adjudication using online systems, digital records and software applications may still have been a pipe dream in some jurisdictions.

The member of the public has nowhere else to turn, of course, except perhaps to their own support groups or lawyers, assuming that they can afford the latter, or still have access to them. In these circumstances, I suggest, a justice system has an obligation to be more transparent and capable of scrutiny, not less. It must involve greater collaboration between the limbs of the state, to ameliorate immediate harm and provide urgent remedies that people need. There are positive lessons that we have learned about which there should be open discussion for the public benefit. For example, lockdown does not easily permit the styles of adversarial justice that many of us are trained in. Alternative procedures, be they remote or online, are necessary, but they are expensive to design, particularly if they are to have an equivalent quality of protection for the user, whether advantaged or disadvantaged. They are also viewed with suspicion by those who have no experience of investigative or inquisitorial protections, where the judge is more in the control of the process than the advocates, or the parties. They will not be appropriate for all jurisdictions. They deserve to be trialled, scrutinised and be subjected to research to establish good practice in their use.

In my own jurisdiction, the Tribunals of the United Kingdom, we went remote overnight at the beginning of the first UK lockdown, some eight to nine months ago. We guaranteed jurisdictions that were a priority for the vulnerable would remain available. We identified the urgent remedies that would remain available. We developed, with the Government and Parliament, new rules, new procedures, and new ways of working for the judiciary, including their training, to deliver remotely approximately 3,000 out of the 5,000 or more cases a week that we traditionally provided for our users. We tried to be agile in responding to the pandemic and as swift as we could be both in the way urgent cases were determined but also in the development of new ways of working. We remained open for business and remain willing to participate in research and scrutiny about what has worked and what has not. I reported on what we had achieved to the UK Parliament and to Government Ministers. The approach was strategic, intensely focussed on the needs of users and very aware that the decisions involved policy questions that affected our different communities in

different ways, questions that ultimately needed to be resolved collaboratively with democratic representatives.

A pandemic may or may not become an increasingly frequent fact of life, but the development of a strategy, policies, funding, and procedures for the fair delivery of justice during an emergency are real lessons to be learnt, and they can only be learnt by asking you, the judges, and our users, so that we get this right for the future. The subtle and sophisticated determinations that we make as judges to resolve conflict and provide clarity and certainty are even more necessary in times of emergency when respect for different values and traditions may become less prevalent. It is a pleasure to be joining a group of judges and academics who are devoted to the task of safeguarding the rule of law by enhancing trust, respect and confidence in our systems.