



SENIOR PRESIDENT  
OF TRIBUNALS

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**THE DUTY OF LEADERSHIP IN JUDICIAL OFFICE**

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**(1) Introduction<sup>1</sup>**

1. The great US scholar Professor Lon Fuller once described law as a shared enterprise. It was, and is, one where individual conduct is made subject to the '*governance of law*'.<sup>2</sup> In a recent, and excellent book, Professor Gillian Hadfield, has examined that idea in the context of the IT and digital revolution and the effect it is having, could, and ought to have, on our justice systems.<sup>3</sup> That she has, has a particular resonance with me.
2. As Senior President of Tribunals, I have since my appointment (as well as in previous roles) been closely involved with reforming our justice systems. While I was a High Court judge in the Family Division, I played a key role in the implementation of family justice reforms. Since my appointment as Senior President, with the Lord Chief Justice, I have led judicial engagement in the Courts and Tribunals Modernisation Programme (the reform programme). Both sets of reforms, and particularly the latter, centre on the effective application of improved process and digital technology to our courts and tribunals.
3. The reform programme is a shared endeavour. It, like HMCTS itself, is a partnership between the judiciary and the Government. It is one that is underpinned by statutory reform<sup>4</sup>; as such it is also a partnership with Parliament. All three branches of State are thus working together to improve our justice system. As with any shared endeavour, for it to succeed there must be effective leadership. If considered unreflectively, the question who should lead the reform programme would suggest one answer: the Government. In this case that would mean the Lord Chancellor and the Ministry of Justice. They would be responsible, as they are generally, for justice policy and for preparing and introducing necessary legislation to Parliament. It might appear that the judiciary would have no leadership role to play.
4. The Government leading, while seeking judicial views on its proposals, might once have been the case. Since 2005, however, the landscape has changed fundamentally. The reform was foreshadowed by the 2004 Concordat: the agreement between Lord Falconer LC and Lord Woolf CJ that set out how their respective roles would change to better reflect the

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<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture.

<sup>2</sup> L. Fuller, *The Morality of Law*, (Yale, 1964).

<sup>3</sup> G. Hadfield, *Rules for a Flat World*, (OUP, 2016).

<sup>4</sup> See for instance, The Courts and Tribunals (Judiciary and Functions of Staff) Bill 2018 <<https://publications.parliament.uk/pa/bills/lbill/2017-2019/0108/18108.pdf>>, and previously the Prisons and Courts Bill 2017 <<https://publications.parliament.uk/pa/bills/cbill/2016-2017/0170/17170.pdf>>, which was originally intended to provide the statutory underpinning to the reform programme but which fell with the 2017 General Election.

separation of powers. Under that agreement, the Lord Chancellor's role as head of the judiciary, which had been in place since the Judicature Act 1873,<sup>5</sup> was to be transferred to the Lord Chief Justice.<sup>6</sup> It also delineated the responsibilities that were to fall to both the Lord Chancellor and Lord Chief Justice under the new constitutional settlement. Importantly, it stated that the latter would become responsible for: representing the judiciary's views to Parliament and the Government; putting in place structures to secure the well-being, training and guidance of the judiciary; and, for putting in place structures for the effective deployment of judges and the allocation of work in the courts.<sup>7</sup>

5. The Concordat is a document of constitutional importance. It reflects an agreement between two branches of the State concerning the governance of the judiciary. It formed the basis of what became the Constitutional Reform Act 2005, which effected the statutory changes necessary to transform the Lord Chief Justice into the President of all the courts in England and Wales; into the Head of the courts judiciary.<sup>8</sup> It also gave statutory force to the responsibilities I outlined a moment ago.<sup>9</sup> The new constitutional settlement placed these, and other, duties upon the Lord Chief Justice; duties of leadership.<sup>10</sup>
6. The relationship between the courts and the Government was not alone in undergoing fundamental reform in the first decade of the century. The Tribunals underwent arguably more wide-reaching reform. Following the Leggatt Review of 2001,<sup>11</sup> the many and varied Tribunals were unified via the Tribunals, Courts and Enforcement Act 2007. It created the First-tier and Upper Tribunal, the latter being a superior court of record with all the powers and duties of the High Court and the office of Senior President of Tribunals as Head of the tribunals judiciary.<sup>12</sup> As with the Lord Chief Justice, the Senior President was to be responsible for representing the views of tribunal judges to the Government and Parliament; for making effective arrangements for their welfare, training and guidance; and, for their deployment.<sup>13</sup> Additionally, and reflecting the inherent nature of the Tribunals, the Senior President is also required to ensure they are accessible, fair, handle disputes quickly and efficiently, for tribunal members to be experts in their fields, and to develop innovative dispute resolution methods.<sup>14</sup>
7. The duties of leadership do not stop there. Both the Lord Chief Justice and I have the responsibility for issuing Practice Directions, that is to exercise the common law power (in respect of the courts) and statutory power (in respect of the Tribunals) to provide rules of practice and procedure for the courts and Tribunals.<sup>15</sup> Additionally, the Lord Chief Justice has a duty, held jointly with the Lord Chancellor, to encourage diversity among the

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<sup>5</sup> See Judicature Act 1873, ss.5 and 6, which made the Lord Chancellor both the President of the Court of Appeal and High Court.

<sup>6</sup> *Constitutional Reform - The Lord Chancellor's judiciary-related functions: Proposals* (January 2004), known as The Concordat, para.11. It is reprinted in Report from the Select Committee on the Constitutional Bill, vol. 1, HL Paper No. 125-I (24 June 2004), Appendix 6. For an overview, see S. Shetreet & S. Turenne, *Judges on Trial*, (CUP, 2013), chapters 1 – 3.

<sup>7</sup> The Concordat para.4.

<sup>8</sup> Constitutional Reform Act 2005, s.7(1)

<sup>9</sup> Constitutional Reform Act 2005, s.7(2). Crime and Courts Act 2013, s.21.

<sup>10</sup> A flavour of the extent of the duties can be seen by those that have been variously delegated since 2006: see Lord Chief Justice's Statutory Delegations No.1 of 2018, <<https://www.judiciary.uk/wp-content/uploads/2015/12/lcj-delegations-schedule-no-1-of-2018.pdf>>.

<sup>11</sup> A. Leggatt, *Review of the Tribunals, Tribunals for Users, One System, One Service* (HMSO, 2001) <<http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>>

<sup>12</sup> Tribunals, Courts and Enforcement Act 2007, s.2.

<sup>13</sup> Tribunals, Courts and Enforcement Act 2007, schedule 1, part 4, paras. 13 and 14; schedule 2, para.8 and schedule 3, para. 9; schedule 4, part 2.

<sup>14</sup> Tribunals, Courts and Enforcement Act 2007, s2(3).

<sup>15</sup> Constitutional Reform Act 2005, schedule 2; Tribunals, Courts and Enforcement Act 2007, s.23.

judiciary.<sup>16</sup> Since the Crime and Courts Act 2013, both the Lord Chief Justice and I, as Senior President, are responsible for making judicial appointments, in my case of almost all my judicial office holders.<sup>17</sup> As a result we come under a number of duties imposed by the Equality Act 2010 concerning such appointments. And equally, the Lord Chief Justice, again jointly with the Lord Chancellor, is responsible for judicial discipline;<sup>18</sup> a duty which I share.<sup>19</sup>

8. In these last set of duties, we can see a further feature of the new constitutional settlement: partnership. Leadership is not required of the judiciary alone. It is carried out with the Government. This is most clearly seen through the administration of the courts and Tribunals. Since 2007, Her Majesty's Courts and Tribunals Service (HMCTS) has operated as a formal partnership between the Lord Chancellor, the Lord Chief Justice and the Senior President.<sup>20</sup> In strict constitutional theory, HMCTS is an aspect of the executive; it is part of the Ministry of Justice. Acknowledging the post-2005 and post-2007 settlements, the Lord Chancellor has, however, agreed that it should operate under a board which, uniquely, is responsible to both the executive and judiciary. Both of these branches of the State are thus under a duty to provide leadership to the administrative means by which the courts and Tribunals deliver justice.
9. Having outlined the nature of the leadership duties now placed upon the judiciary, I want to explore two issues:
  - First, the manner in which we give effect to those duties; and
  - Second, the principles which guide their application.

### **Implementing the duties**

10. It is one thing to have duties and responsibilities, it is another to be able to carry them out effectively and then to do so. When the Lord Chancellor was head of the judiciary, discharging the various duties relating to the judiciary that went with that office, it was something that could be carried out through the Lord Chancellor's Department. As is well-known, Ministers can act through their senior civil servants under what is known as the *Carltona* doctrine.<sup>21</sup> The Lord Chancellor thus had the necessary means to effectively carry out his duty of leadership.
11. Prior to the 2005 Act, the Lord Chief Justice and the other Heads of Division had small private offices. Very often these consisted of their clerk, a private secretary and, for some, a diary secretary. There was no dedicated civil service for the senior judiciary. No department for the judiciary. The first thing that was needed therefore was an administration akin to, what is now, the Ministry of Justice. That administration was created by way of what is known as the 'mini-Concordat'; the agreement between the Government and judiciary which made provision for the creation of what is now the Judicial Office of England and Wales.<sup>22</sup> It provides the cadre of civil servants who work for the Lord Chief Justice, other Heads of Division, and, since 2007, for the Senior President

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<sup>16</sup> Constitutional Reform Act 2005, s.137A.

<sup>17</sup> Crime and Courts Act 2013, schedule 13, part 4.

<sup>18</sup> Constitutional Reform Act 2005, s.108.

<sup>19</sup> Lord Chief Justice's Statutory Delegations No.1 of 2018 at 157-166.

<sup>20</sup> HMCTS Framework Document (July 2014)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384922/hmcts-framework-document-2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf)>.

<sup>21</sup> *Carltona v Commissioner of Works* [1943] 2 ALL ER 560

<sup>22</sup> See S. Shetreet & S. Turenne *ibid* at 66.

of Tribunals. Their primary duty, consistent with the constitutional principle of judicial independence, is to the judiciary.<sup>23</sup>

12. There is however one particular and fundamental difference between the Judicial Office and the Ministry of Justice. It relates to the *Carltona* doctrine. While the matter has not been before a court for determination, and my comments here should not be taken to express a view, it is believed that that doctrine does not apply to the Judicial Office. There are two difficulties.
13. The first is applying *Carltona* to civil servants working for and to the judiciary, rather than those who work for Ministers in central government. A distinction can be drawn between members of the executive – civil servants – carrying out acts for the executive – Ministers, and members of the executive carrying out acts, albeit executive acts, for judges who are not themselves members of the executive. On the other hand it could be said that as the powers transferred to the judiciary by the 2005 Act, and provided for the Senior President through the 2007 Act, are executive ones, then *Carltona* should apply now as it did when the Lord Chancellor exercised them.
14. The second difficulty, and one which also points away from reliance on *Carltona*, is the fact that the 2005 Act introduced a baroque scheme of express delegation for the various functions.<sup>24</sup> A similar, albeit wider, delegation power exists for the Senior President under the 2007 Act.<sup>25</sup> The provision of such an express power would seem to point away from the application of *Carltona*.
15. Whatever the ultimate answer to this question, the approach which has been taken is that where functions can be delegated they are delegated to specific judges; those with expertise and those with a specific interest.<sup>26</sup> Hence functions relating to civil justice are delegated to the Master of the Rolls as Head of Civil Justice; disciplinary functions concerning Tribunals judges are delegated to the Senior President and so on. They are then exercised by the delegate personally, although members of the Judicial Office provide expert advice and assistance. The structure thus created, the extent of which can be seen from a 351 page document called the *Lord Chief Justice's – Statutory Delegations*, is complex. One important difference between the manner in which I exercise my functions and the way the Lord Chief Justice exercises his, is that the 2007 Act provides me with an express power to exercise any function which I have delegated while the delegation is in force.<sup>27</sup> The 2005 Act does not make similar provision for the Lord Chief Justice. There is therefore a certain degree of additional flexibility in the Tribunals' approach.
16. Formal delegation is further supplemented by organisational arrangements. Both the 2005 and 2007 Act provide for some functions, those relating to training, guidance and welfare, to be carried out by way of 'appropriate arrangements' put in place by or on behalf of the Lord Chief Justice and Senior President.<sup>28</sup> These do not require formal delegation; the statutory language provides the basis for a more informal approach. It also permits decisions to be taken by Judicial Office staff members. And, equally it provides a basis for the senior judiciary to develop, refine and then implement policy decisions. Such

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<sup>23</sup> The SPT also has access to and obtains considerable independent advice from the Scottish Judicial Office and the office of the LCJ in NI

<sup>24</sup> See Lord Chief Justice's Statutory Delegations No.1 of 2018.

<sup>25</sup> Tribunals, Courts and Enforcement Act 2007, s.8.

<sup>26</sup> As was noted during the passage of the Constitutional Reform Act, as noted by Shetreet & Turenne, 'It was not intended that the Lord Chief Justice should exercise all these powers and functions personally . . .'; see S. Shetreet & S. Turenne *ibid* at 47.

<sup>27</sup> Tribunals, Courts and Enforcement Act 2007, s. .

<sup>28</sup> Constitutional Reform Act 2005, s.7(2)(b) and (c); Tribunals, Courts and Enforcement Act 2007, 2007, schedule 1, part 4, paras. 13 and 14; schedule 2, para.8 and schedule 3, para. 9; schedule 4, part 2.

arrangements encompass, the carrying out of local leadership and welfare functions by Presiding Judges and Tribunal Chamber Presidents, the development and implementation of programmes to facilitate diversity in the judiciary, and the most recent, the establishment of the Judicial Data Protection Panel. At the apex of these arrangements sits the Judicial Executive Board and the Tribunals Judiciary Executive Board, both of which act as a form of advisory Cabinet for the Lord Chief Justice and Senior President.<sup>29</sup>

17. The means by which we give effect to our leadership duties can thus be summarised as follows:

- The Judicial Office provides executive, management, human resources, policy and legal support for the senior judiciary to help enable them carry out their duties effectively;
- The various duties and leadership functions are carried out by a wide-range of members of the judiciary either under express delegation or via arrangements put in place by the Lord Chief Justice and Senior President;
- High level policy decisions are considered by the JEB and TJEB, with decisions then taken in the light of such consideration and advice, by the Lord Chief Justice or Senior President.<sup>30</sup>

18. It should be apparent that the wide variety of leadership functions impose very significant time and management pressures on the senior judiciary, many of whom already have very significant administrative responsibilities. And of course, this is all on top of their primary role: managing proceedings and trying cases.

### **The principles guiding the application of the duties**

19. Having outlined the architecture of leadership, the question is then: how should it operate? Here I want to stress a point which is in my view beyond argument: the senior judiciary have no option but to exercise these duties and powers. The common law has imposed them and Parliament has entrusted them to the judiciary following the 2005 and 2007 constitutional settlements. We have a duty to lead. That is the system which Parliament gave effect to, following the agreement reached between the executive and judiciary in the Concordat, in the 2005 and 2007 Acts. The question is not should we lead, but how do we lead? What are the principles that guide the exercise of the various leadership duties and responsibilities? It is this question I want to now explore. In doing so I want to explore three broad themes: accessibility and accountability; efficacy; and finally, evidence-led proportionality.

### ***Accessibility and Accountability***

20. The first group of principles come under the theme of accessibility and accountability. They are: open justice and accountability; democratic participation and civic engagement; diversity and inclusion; and the coherence of our governance.

21. The first principle to guide the exercise of our leadership duty is that of open justice and accountability. This has a number of elements. First, justice must be open to litigants. Not only in the sense that our citizens must be able to exercise their right of access to a court. But also in the sense that their disputes must be capable of being adjudicated effectively by courts. Openness is not just a function of the cost of access. It is also a function of the nature of access. Most clearly we see this second issue in the growth in e-commerce disputes, significant numbers of which are resolved consensually through ODR mechanisms. Our courts and tribunals need to be able to adjudicate such disputes. If our justice system is to be open, and not to place certain types of digital disputes beyond the reach of the law, it

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<sup>29</sup> For a short discussion see, S. Shetreet & S. Turenne *ibid* at 67.

<sup>30</sup> See, Sales LJ in *R (Richardson) v Judicial Executive Board* [2018] EWHC 1825 (Admin).

needs to be reformed so as to facilitate the bringing of such claims. Claims must be within the ambit of justice not outside of it.

22. Equally, openness requires us to ensure that our courts and tribunals remain open to public and in particular, media scrutiny. We cannot accept a position where they fall outside the view of the public. A judge, a court or Tribunal, observed is, as Lord Neuberger MR observed in the case of *Al-Rawi*, democratically accountable.<sup>31</sup> Publicity is the means to ensure justice does not become arbitrary: it ensures justice is done, the law is applied properly. It ensures that the decisions judges make can be scrutinised and debated by civic society. If, as they do, courts and Tribunals articulate the values instantiated in our laws,<sup>32</sup> their decisions must be capable of robust public debate so that Parliament and ultimately the electorate can, if they think proper, revise, restate or develop the law through the democratic process. Hence open justice and democratic accountability go hand in hand.
23. Democratic accountability is itself linked to the next principle: democratic participation and civic engagement. Justice is not something which can or should be done to people. A just society is one where the delivery of justice, the commitment to do justice is inherent in all our institutions, in all of civic society.<sup>33</sup> Courts and Tribunals, and for that matter the judiciary as a whole, needs to be open to society more broadly than through access to proceedings. There needs to be broader engagement with civic society.
24. This can and is being achieved in a number of ways. Both the Lord Chief Justice and I, as part of our leadership role, inform Parliament about the operation of the justice system. Senior judges appear regularly now, within proper constitutional limits, before Parliamentary Select Committees, notably the Justice Select Committee and the Constitution Committee.
25. More broadly than these forms of democratic accountability, the Lord Chief Justice engages through an annual press conference. And most recently, the Lord Chief Justice and I have added to the work already being done across the country to engage with schools and colleges as part of public legal education. Both the Master and the Rolls and I have also both led calls for greater collaborative work by universities, the professions, and wider society to develop means to promote effective access to the courts.<sup>34</sup> And most recently, the Lord Chief Justice has very persuasively argued that civic engagement, properly done, is one of the means by which the judiciary can help explain the role of the courts and Tribunals, their role in upholding the rule of law. As he put it,

*'The judiciary invites misunderstanding or incomprehension if it stands completely apart and aloof from society. Engagement within proper constitutional bounds will benefit society and the judiciary.'*<sup>35</sup>

Engagement is necessary if we are to properly fulfil our duty of leadership.

26. Accessibility is also given expression by the need to ensure that the judiciary is properly diverse, and inclusive. Two points arise here. If the judiciary is not to stand apart from society it must, and must be seen to be, part of society. It must be seen to be open to all

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<sup>31</sup> *Al-Rawi v Security Services* [2010] EWCA 482, [2012] 1 AC 531 at 543

<sup>32</sup> O. Fiss, *Against Settlement*, (1984) 93 Yale LJ 1073 at 1085.

<sup>33</sup> Sir Ernest Ryder SPT, *Assisting Access to Justice*, (Keele University, March 2018)

<<https://www.judiciary.uk/wp-content/uploads/2018/03/speech-ryder-spt-keele-uni-march2018.pdf>>.

<sup>34</sup> Sir Terence Etherton MR, *LawWorks Annual Pro Bono Awards Lecture*, (December 2015)

<<https://www.judiciary.gov.uk/wp-content/uploads/2016/12/law-works-lecture-mr-20161205.pdf>>; Sir Ernest Ryder SPT, *Assisting Access to Justice*, (Keele University, March 2018).

<sup>35</sup> Lord Burnett CJ, *Becoming Stronger Together*, (Brisbane, September 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/09/lcj-speech-brisbane-lecture-20180910.pdf>>.

within society. If the law is to develop, drawing on the wisdom of all parts of society, just as it draws on the wisdom of the past through the winnowing of the common law method, the judiciary must be able to draw upon the experience, knowledge and values of the society of today. Our law, and society, is impoverished to the extent that it cannot and does not do so. Appointment on merit is a *sine qua non*. But equally, appointment must be from a diverse pool of merit, drawn from across society. We must do all we can to ensure that is and cannot but be the case.

27. Securing a properly diverse judiciary is not simply a public good in terms of the judiciary itself. It is a public good in another, and perhaps more important way. Successful societies are ones which in addition to the rule of law, have stable governance, free and fair elections and, among other things, are societies which are open and inclusive. They are ones where everyone has, and sees that they have, a proper stake in that society. Securing a diverse – an inclusive judiciary – is one of the means by which our society can ensure that this aspect of the health of the nation is continually built upon in the future.<sup>36</sup>
28. The final principle under this theme turns inward. It is the need for there to be a coherent, modern and effective governance structure for the judiciary. This is a theme which Lord Thomas CJ considered in detail.<sup>37</sup> It is one on which I have argued that we need to look to how we organise the structure of judicial management of the courts and Tribunals.<sup>38</sup> Do we need to consider the approach to training judges who exercise leadership roles in modern management techniques? Do we need a management structure which reflects the nature and size of the judiciary today? What might we learn from other jurisdictions, both common law and civilian ones, in terms of how they structure the internal management of their courts and judiciary? I pose the questions today. The duty of leadership requires us to consider the possible answers, and to take what appropriate steps we can to put them in place.

### ***Efficacy***

29. The second group of principles can be grouped under the theme of efficacy. They are: specialism and expertise; localism; and, innovation.
30. First, specialism. Historically, there has always been a tension between specialism and uniformity in our approach to the delivery of justice. Prior to the 19<sup>th</sup> century reforms, there were numerous courts with specialist procedures, differing jurisdictions and judiciaries. It was a form of specialism which benefited few. It was specialism as a barrier to effective access to justice. Since then the courts have moved towards uniform processes. A movement which culminated in the merger of the Rules of the Supreme Court and the County Court Rules in the CPR in 1999.
31. To a certain extent the division between specialism and uniformity is a false one. Both are needed. Both have their place. The one-size-fits all approach of the CPR was in reality never that. There were common processes at a general level: for issue and service of claims for instance. And then there were specialist procedures for specific types of claims whether they be small claims or commercial claims. A common set of high level rules governs the approach in the Tribunals. And the original HMCTS reform concept – and the right one – was to develop a common set of high level procedures for civil, family and tribunal proceedings. And those high level rules could then be properly complemented by specialist rules for specialist processes as necessary.

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<sup>36</sup> For a discussion of the features of healthy societies, and the necessity of inclusiveness, see D. Acemoglu & J. Robinson, *Why Nations Fail – The Origins of Power, Prosperity and Poverty* (Profile Books, 2012).

<sup>37</sup> Lord Thomas CJ, *The judiciary within the State – governance and cohesion*, (Lionel Cohen Lecture, May 2017) <<https://www.judiciary.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf>>.

<sup>38</sup> See Sir Ernest Ryder SPT, *Securing Open Justice*, (MPI Luxembourg, February 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/02/ryder-spt-open-justice-luxembourg-feb-2018.pdf>>.

32. Specialism does not end with procedure. Its focus is also decision-making, or rather the decision-maker. The original idea behind the Tribunals was to draw on specialist knowledge; hence many of them were mixed-tribunals drawing on legal and expert practical knowledge. That remains the case. We go further now, and can go further still. Since the reform of the Tribunals in 2007, and the increase in the ability to deploy judges across the courts and tribunals since 2013, via the Crime and Courts Act, our ability to ensure that we can develop greater judicial expertise has increased. Equally, we are better able to deploy specialist judges to deal with all manner of cases which fall within their field of expertise. We are able, for instance, to develop and utilise specialist expertise in administrative law across the Upper Tribunal and the Administrative Court. We are developing what is becoming known as ‘double-hatting’ where a specialist judge sits to hear proceedings simultaneously in both the courts and tribunals where cases engage their overlapping jurisdictions.<sup>39</sup> Well-developed judicial specialism, properly deployed cannot but be necessary for the future development of our justice system. If we are to secure better access to proportionate dispute resolution through expert decision-making, this is a principle that must inform how we exercise leadership of the judiciary.
33. Specialism is not sufficient. It must equally go hand in hand with localism. Local justice has been a feature of our justice system since its earliest development. Its link to democratic participation is patent: justice must be something you can experience within your immediate community, town or city. It cannot be remote; cloistered only in London or other large cities across the country. If it were or were to become remote, it would cease to be something we share as a society. Localism thus has an intrinsic link back to civic engagement. It is also, and fundamentally, an issue of accessibility. Local justice is accessible justice. Throughout Great Britain the First-tier Tribunal sits at local hearing centres. The Upper Tribunal Administrative Appeals Chamber and the EAT sit in national geographic centres. The Upper Tribunal Immigration and Asylum sits regionally, and Lands and Tax and Chancery Chambers sit where cases require. On the courts side, the Business and Property Courts have centres throughout England and Wales. Administrative justice is as much a matter for hearing in Manchester and Birmingham as it is in London. As Lord Thomas CJ said, no case is too big to be heard outside London.<sup>40</sup>
34. Modernisation must ensure that local justice in these forms is maintained. It must enhance it. This can be achieved in a number of ways. First, by the active leadership of judges in advisory councils, such as the Civil and Family Justice Councils, or in the recently established Administrative Justice Council. Second, through ensuring that modernisation reforms, which utilise technology, enable greater local accessibility of the justice system. Technology should, for instance, be considered as a means of bringing justice to local town halls and other civic spaces. Third, by facilitating greater cross-jurisdictional use of local and regional hearing centres. Fourth, by developing greater use of continuous and asynchronous hearings, which enable court and Tribunal users to access live hearings in a manner which best suits their lives, which best facilitates their active participation. By way of example here, we are to pilot digital evidence sharing with DWP and asynchronous conversations so that we can conduct some live hearings without the need for a disabled user to face a difficult journey to a hearing room which many say they find threatening. Local justice need not stop at the town square.

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<sup>39</sup> See for instance the scheme operative in the County Court at Central London and the First-tier Tribunal Property Chamber <<http://41todw2i37w9c74zg3ndz7xp-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Guidance-unopposed-business-lease-renewals.pdf>>.

<sup>40</sup> Lord Thomas CJ, *Justice in one fixed place or several?*, (Lord Birkenhead lecture, October 2013) <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-birkenhead-lecture-21102013.pdf>>.

35. This takes me to the final principle under this theme: innovation. It is Gillian Hadfield's theme. And it has underpinned the very valuable work done by Richard Susskind on court and Tribunal reform. It focuses on the question of what should we be doing to reshape justice and its delivery in ways that can properly engage today's society. It asks us to focus modernisation on what society needs given our data-driven, technology-based lives. To that end we need to focus far more than we have in the recent past on the nature of disputes, on the nature of evidence, and on what our justice system should deliver and how it should do so. The post-War world saw a need to develop administrative law and human rights law in ways that pre-War society had not done. Just as it had seen the need to develop new types of procedure and causes of action to deal with a world of mass production, we are now facing a world where the digital economy, whether it be smart contracts, or e-commerce, requires us to reconsider how we configure our justice systems. In that regard Lord Briggs' vision of an online civil court embodying ODR and adjudication was a signal step forward. It was an example of clear-sighted innovation. We need to build on such a vision and develop it further. To do so it will be essential for the judiciary to engage constructively with the academy, with individuals who are expert in the new economy, with Ombudsman, with approaches being taken overseas such as the Civil Resolution Tribunal in British Columbia, Canada. Leadership requires the judiciary to learn from those with expertise, with those who themselves innovate. Leadership requires innovation. And innovation depends on engagement. We cannot shy away from it. And after innovation and engagement there is the additional task of effective implementation.

### ***Evidence-led Proportionality***

36. Finally, I turn to evidence-led proportionality. In 1995 Lord Woolf in his Interim Access to Justice report, noted that civil procedure and its cost should be '*proportionate to the nature of the issues involved*.'<sup>41</sup> This was not, as some might believe, the first time that proportionality was a guiding principle in the development or delivery of justice in England and Wales. Proportionality was inherent in the dual development of the County Courts and their relatively simpler forms of process and the High Court and its more detailed procedures. It was inherent in the development of the Tribunals, their procedures and the fact that they were intended and designed to be accessed by litigants rather than primarily by lawyers.

37. Since the late 1990s proportionality has moved from being one principle that has guided the operation of our justice system to centre stage. Just as it underpins modern case management, it underpins increasingly flexibility deployment of the judiciary across the courts and Tribunals, and the development of innovative approaches to dual sittings of the courts and Tribunals where they have overlapping jurisdiction, which I referred to earlier.

38. It also informs our approach to leadership. It does not do so in an esoteric way. It is a practical principle, as can readily be seen by the broad use of the statutory delegation powers by the Lord Chief Justice and myself. If it is to guide our approach to leading the modernisation of the justice system how ought it to do so? I believe a four stage approach should be taken.<sup>42</sup>

39. First, when considering reform or reforms we must ask ourselves if the policy objective we are pursuing furthers the achievement of accessible, accountable, open justice. An example of this practical focus can be seen in something Lord Dyson said whilst he was Master of the Rolls. Considering the current reform programme, he paused over the role technology

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<sup>41</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995) chapter 1, paragraph 3.

<sup>42</sup> The approach is articulated in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at [19] and *(R) Quila v Secretary of State for the Home Department* [2012] 1 AC 621 at [45]. See Sir Ernest Ryder SPT, *Securing Open Justice*, (MPI Luxembourg, February 2018) at [30] – [33].

was to play. He cautioned against reform for technology's sake; against a 'because we can do it, then we should do it' approach. He put it this way,

*'Open justice is rightly prized as an essential element of our system of justice. Justice must not only be done, but must be seen to be done. There is an obvious tension between the preservation of this fundamental principle and the promotion of virtual, internet-based, systems and processes that enhance efficiency and cost-savings. It is one thing to conduct mediations out of the public gaze. This is already done and there can be no objection to it. But we should not allow advances in technology to lead to secret court determination of disputes. It will be a technical challenge to find a solution to this problem. Technology must be the servant of justice, not its master.'*<sup>43</sup>

Our policy objective is but cannot simply be to digitise our justice system. That would be to elevate function over purpose. To render digital the master and not the servant. Equally, modernisation's purpose cannot be, as some have suggested, the pursuit of austerity. A more efficient, technology-infused system may be more economical for the State but economy cannot be our overriding aim if the price we are to pay is a reduction in open, accessible, accountable justice. If we are to lead reform, then we must be clear about our policy objective, and the boundaries it places around the use of technology and the pursuit of economy. So in pursuing the policy objective of digitisation, we do so because and only to the extent that it furthers open, accessible justice. If it were understood not to do so, we would be duty bound to reject it.

40. The second question is then, are the proposed means to implement the policy objective rationally connected to it. We are pursuing digital processing, to make filing and managing claims more accessible. That process is to be simpler, more user-friendly for litigants-in-person than our established ways of working. We are pursuing video hearings on the basis that they make it easier, and less-daunting, for some litigants to access the system. We pursue this aim because and to the extent that it is able to increase public participation in the justice system by making it more easily accessible.
41. The third and fourth questions follow: are the measures to be taken no more than necessary to achieve the policy objective, and do they strike a fair balance between the rights of the individual and the interests of the community. Both are inherent in Lord Dyson's warning. We must ensure we do not go too far. This requires careful planning and the exploration of options for modernisation. It requires a critical assessment of the consequences of intended reform. Nobody could properly support, for instance, a use of technology which crucially undermined public participation in justice while promoting individual participation. Nobody could properly support measures aimed at increasing efficiency or promoting economy if in doing so they undermined the rights of individuals to be able to access the justice system effectively, or of the public interest in securing the rule of law.
42. Proper planning and effective implementation of well-planned reforms is not sufficient however to satisfy the third and fourth questions. What is also, and crucially needed, is ongoing scrutiny of implementation. Effective, robust and statistically sound research is necessary during implementation i.e., through research-based pilot schemes. It is equally necessary post-implementation. A point inherent in the view expressed earlier this year by Lord Burnett CJ's that modernisation is a process and not event.<sup>44</sup> A point I made earlier

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<sup>43</sup> Lord Dyson MR, *Delay too often defeats justice*, (Law Society, April 2015) at [30] <<https://www.judiciary.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf>>.

<sup>44</sup> Lord Burnett CJ, *The Age of Reform*, (Sir Henry Brooke Lecture, June 2018) at [39], '*Modernisation will not stop in 2023. It is not an event but a continuing process. Too often in the past that point, whilst appreciated by the far-sighted, was not acted on by Government, which is why there is now so much to be done in a relatively short time.*' <<https://www.judiciary.uk/wp-content/uploads/2018/06/speech-lcj-the-age-of-reform2.pdf>>

this year when I outlined the necessity of feedback continuing post-implementation; feedback which will enable us to consider how the reforms work, whether they are achieving their aims. And if they are not where and why they are not, to enable remedial action to be taken in real time rather than once every ten years as has been the historic pattern of reform.<sup>45</sup>

43. In approaching our future approach to judicial leadership of the justice system, our approach to developing and implementing reform policies, we cannot but adopt these four clear guiding principles. They must be our rule of reason.<sup>46</sup> And they must be evidence-led and subject to ongoing evidence-based scrutiny.

### **Conclusion**

44. I have said before that we are living through an age of transformations.<sup>47</sup> The delivery of justice is not and cannot be exempt from change. It too must evolve in the light of new technology, so as to better secure effective access to justice for all. It must not do so in an unplanned, uncritical way. It must not do so unreflectively. When reforms have been carried out effectively in the past they have been the product of critical consideration. They have been evidence-based, and here the best example of this – and it reaches back in time I am afraid, is the evidence-gathering exercises that were carried out by the 19<sup>th</sup> century court reformers. Where those reforms succeeded it was because there was clarity of purpose, a strong evidence-base identifying the source of the problems to be overcome, and considered conclusions concerning how they were to be rectified. It was an era of guided transformation. Guided by judicial leadership, which is itself guided by proportionality.

45. If we are to harness the full potential of the IT revolution to improve the accessibility and accountability of our justice systems, to improve democratic participation in the shared enterprise that is the governance of law, to innovate where innovation improves the delivery of justice, then the judiciary cannot shirk its duty of leadership. Nor can it approach it in anything other than a coherent, considered manner, one which draws on evidence, which weighs it properly, and which continues to draw on it to monitor implementation.

46. Let me then identify the ten principles which I see underpinning judicial leadership, how it and how modernisation of our justice system should be carried out:

- Open justice;
- Accountability;
- Accessible justice;
- Democratic participation and civic engagement;
- Diversity and inclusivity;
- Specialism and Expertise;
- Localism;
- Proportionality, including speed and efficiency;
- Innovation that is evidence-based and tested; and
- Coherent governance.

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<sup>45</sup> Sir Ernest Ryder SPT, *What's happening in justice: the view from England and Wales*, (UCL Future of Justice Conference, May 2018) at [27] – [30] <<https://www.judiciary.uk/wp-content/uploads/2018/05/speech-ryder-spt-ucl-may-2018.pdf>>

<sup>46</sup> Sir Ernest Ryder SPT, *Securing Open Justice*, (MPI Luxembourg, February 2018) at [32].

<sup>47</sup> Sir Ernest Ryder SPT, *What's happening in justice: the view from England and Wales*, at [1]

47. If we apply these principles, lead consistently with them, we will – I am sure – help to deliver a justice system fit for the 21<sup>st</sup> century; a justice system that is fit for the just governance of law for all our citizens.

48. Thank you.

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