



THE BLACKSTONE LECTURE 2021

'JUSTICE IN A CRISIS'

GIVEN BY

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On the 5th January 2021 as the UK Government began to further develop lockdown restrictions during the Covid-19 pandemic, the Nuffield IFS Review of Inequalities chaired by the Nobel Laureate Sir Angus Deaton produced a report as part of its review¹. Its message was stark:

"The pandemic has widened existing social faultlines and created new ones. It is a fantasy to suppose that they will simply close and the economy and society will revert to some kind of pre-pandemic normal²"

The key findings were described as follows³:

- We are not all in this together when it comes to our health;
- We are not all in this together when it comes to our livelihoods;
- We are not all in this together when it comes to education;
- Financially speaking, the young and the old are not in this together.

As Sir Angus commented:

¹ Johnson & Ors, *The IFS Deaton Review of Inequalities: A New Year's message*, The Institute for Fiscal Studies, 5 January 2021, ISBN 978-1-80103-020-5.

² Deaton. A, *Covid shows how the state can address social inequality*, 5 January 2021, FT, www.ft.com/content/caa37763-9c71-4f8d-9c29-b16ccf53d780.

³ Nuffield Foundation News, *The IFS Deaton Review of Inequalities: A New Year's message*, Nuffield Foundation, 5 January 2021, www.nuffieldfoundation.org/news/ifs-deaton-review-inequalities-new-years-message.

“Covid-19 has highlighted pre-pandemic inequalities more vividly than we could have imagined. It has cruelly exposed disparities in our abilities to weather threats to our livelihoods, to our children’s educational progress and to the physical and mental health of us all. These disparities reflect pre-existing inequalities in education, income, location and ethnicity...”⁴

The language of exclusion is worthy of note, given the political realities that have faced Western States since the financial crisis of 2008. At the inception of his review in 2018 Sir Angus raised the possibility that inequalities may prove a threat to our economic, social and political systems, unless they are tackled effectively⁵. The evidence cited of differentially increasing mortality as one of the consequences of increasing inequality and its exacerbated effect during this crisis should be a clear warning to us of the seriousness of the political considerations that have arisen and which may persist. Sir Angus added that: “Catastrophes can create space for reforms previously hard to imagine; they can also turn impossibilities into imperatives⁶”. Only two days later there were scenes at the heart of Government in the United States that must concern any constitutional democracy.

The case for change that Sir Angus makes is redolent of that which underpinned the imperative to tackle ‘*the five giants of want, disease, ignorance, squalor and idleness*’, as Lord Beveridge described them⁷ as long ago as the 1940s, and which ultimately led to the creation of the welfare state following one of our previous states of emergency, that time in war⁸. Justice systems were not part of Lord Beveridge’s terms of reference, but at various stages from then until now the quality of our justice systems measured by their outcomes and in particular the equality of access that should be our loadstar, has certainly been in issue. Lord Rushcliffe’s parallel work which led to the Legal Aid and Advice Act 1949 and a report on Supreme Court Practice and Procedure in 1953 made no pretence at slaying the sixth giant: ‘injustice’⁹. For all its importance, the advent of legal aid was not to be a pillar of the new welfare state¹⁰. Subsequent reports on questions concerning the justice system may have great merit but they seldom touch upon the structural strengths and weaknesses of the

⁴ Deaton.A, FT, *ibid*.

⁵ Johnson.P, IFS, *ibid*.

⁶ Deaton.A, FT, *ibid*.

⁷ <https://www.nationalarchives.gov.uk/wp-content/uploads/2014/03/t-161-11651.jpg>.

⁸ Timmins.N, *The Five Giants – A Biography of the Welfare State*, 3rd ed, (William Collins, 2001), and see Beveridge.Sir W, *Report on Social Insurance and Allied Services*, (November 1942), Cmd 6404/1942.

⁹ *The Committee on Supreme Court Practice and Procedure, Final Report*, (1953), Cmd Rep 8878/1953.

¹⁰ Brooke.H, *The History of Legal Aid 1945 to 2010*, Bach Commission on Access to Justice: App 6, (2017) at 5, and see Egerton, R, *Legal Aid*, (Routledge, 1998).

justice system taken as a whole, considering not just its laws but the manner in which they are created, administered and delivered. It is high time for such a review. As a former President of the United States, Thomas Jefferson, said in July 1816¹¹:

“...laws and institutions must go hand in hand with the progress of the human mind...”

The Rule of Law in a crisis is also surprisingly under-developed. That is perhaps because our different jurisprudential theories analyse justice and the rule of law from different first principles to which I shall briefly refer, but which need not detain us today. In her recent Romanes Lecture for Oxford University, the former President of the Supreme Court, Baroness Hale of Richmond, opined on *law in a crisis*¹². She identified the tension, as she saw it, between the need to respond with emergency measures and the need to find principled limits to what governments can do if we are not to descend into tyranny. Her hypothesis is that the amidst the clash of arms the law should not be silent¹³. I respectfully agree.

There is a question that arises: how is the Rule of Law to be effective in as well as after a crisis? That is a question not simply about the content of the law or about judicial behaviours in a crisis¹⁴ but about justice and its systems. It is about the dignity of people in our communities and how the common good ought to be pursued by the State so that the trust, respect and confidence of our people in the Rule of Law is maintained. It needs political, normative and empirical perspectives to be considered if the question is to be answered.

If I am asked to justify the approach to justice systems that I am suggesting be taken, I would do so from the perspective of the user or rather a practitioner used to working with many of our most vulnerable users, rather than a jurisprudential purist. I acknowledge that in doing so I may do violence to the work of scholars of jurisprudence who are colleagues, for which my apologies. My mitigation is that experience both on and off the bench of how effective the Rule of Law is should be explained, if it is not to be ignored. Like the former President of the Supreme Court, Lord Neuberger of Abbotsbury, I have come to the firm view that we have

¹¹ Meacham.J, *Thomas Jefferson – The Art of Power*, (Random House, 2012); Letter to Samuel Kercheval, <https://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/>.

¹² Hale, B, *Romanes Lecture, Law in a Time of Crisis*, 25 November 2020. (Oxford University, 2020).

¹³ *Liversidge v Anderson* [1942] AC 206 per Lord Atkin at 244.

¹⁴ See, for example: Dyzenhaus.D, *The Constitution of Law, Legality in a Time of Emergency*, (CUP, 2006) at 17-18 and 20 et seq and Simpson.B, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain*, (OUP 1992) pg 363 and 420.

an obligation to ensure that people understand what is going on in our courts¹⁵, both systemically and in the individual case. Justice, in the old and universally accepted adage, ‘*must be done and be seen to be done*’, but of course to be so it must be explained as well as understood. Consequently, there is an important function involving information, communication, education and dialogue with people that is insufficiently acknowledged. That descriptive element and the use of intelligible language must run through how the question is to be answered.

As one of the former Heads of Jurisdiction¹⁶ in the UK, I was responsible for safeguarding the Rule of Law and the effectiveness of its delivery; governed by a range of statutory duties which were as extensive as any in the Western world. Those duties included a requirement to ensure that the tribunals were accessible, fair, handled disputes quickly, efficiently and with informality, had judicial office holders who were expert in their specialisms and had available to them innovative dispute resolution methods¹⁷. The duties helped frame the leadership of the justice system for which I was responsible¹⁸.

The experience of judicial leadership to which I have referred included at least two crises, the first was a consequence of economic austerity following the financial collapse of 2008. That led to funding constraints that threatened to limit access to justice and the quality of outcomes in our courts and tribunals in ways that were unacceptable. At that time, Lord Neuberger rightly described the impact in these terms:

“in England and Wales, the court system is groaning and in danger of collapse. We need a serious injection of money, which is being considered, and a serious rationalisation of the courts and of the technology available to us, so that the courts system really is fit for the 21st century”¹⁹

Lord Thomas, then Lord Chief Justice of England and Wales, put it this way:

¹⁵ Neuberger, D and Riddell, P, *The Power of Judges*, (Haus Publishing and Westminster Abbey Institute, 2018) at p. 11.

¹⁶ The Senior President of Tribunals is the head of the tribunals judiciary for the whole of the UK.

¹⁷ Tribunals, Courts and Enforcement Act 2007, s 2(3).

¹⁸ See Ryder, Sir E and Hardy, S, *Leadership of the Judiciary*, (OUP, 2019); and Ryder, Sir E, *Constitutional Norms and Modern Methods*, 3 October 2018, and *The Duty of Leadership in Judicial Office*, 22 October 2018, www.pembroke.ox.ac.uk/master/speeches.

¹⁹ Neuberger, D, *ibid* at p. 42.

“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...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.”²⁰

The second was the present Covid-19 crisis which necessitated innovative ways in our courts and tribunals to facilitate effective access to justice by our users. Whether Lord Sumption, another former Supreme Court Justice, is right in describing the measures taken by Ministers as *“the most significant interference with personal freedom in the history of our country”²¹* is a separate question, but on any basis, the need for effective access to justice in the conditions that have arisen ought not to be a question involving much dispute²². As a consequence, I have a view about what works. There are other views which equally need to be heard, just as there needs to be a forum within which these discussions can occur.

You do not need to be a Head of Jurisdiction or a government Minister to understand that justice systems exist outside the formal corpus of legislation and precedential decisions. Government owns the system and exercises its responsibilities through a Secretary of State (and his equivalents in the devolved administrations) who since the constitutional reforms of 2004-07 in the UK²³ is not a member of the judiciary and need not be a lawyer. The responsibility for the administration of justice is shared with the judiciary who deliver it. The Lord Chancellor is no longer President of our Courts and Tribunals, in each case it is the Head of Jurisdiction: the Lord President, the two Lords Chief Justice and the Senior President. They are each independent of each other, as are the justice systems they lead. They meet and exchange valuable experience about their justice systems in accordance with their statutory

²⁰ Thomas.J, *Reshaping Justice*, JUSTICE Lecture, 3 March 2014, (JUSTICE, 2014).

²¹ Sumption, J, *Government by Decree: Covid-19 and the Constitution*, Cambridge University Freshfields Lecture, 26 October, 2020, (Cambridge University, 2020).

²² Although it can be acknowledged that the relationship between access to justice and the Rule of Law is more sophisticated than mere assertion by incantation: see Lucy.W, *Access to Justice and the Rule of Law*, OJLS (2020), 40 (2), pp. 377-402.

²³ See for example: The Concordat of 2004, the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007.

duties of mutual collaboration, but it is rare for the general public to become aware of the same and the benefit that is the consequence is accordingly confined within a private debate.

In each geographic jurisdiction there is a 'Framework Agreement'²⁴ (or its equivalent in Northern Ireland) that reflects the partnership with Government. In England and Wales that is made between the Senior President, the Lord Chief Justice and the Lord Chancellor. It is the basis for the funding arrangement that supports Her Majesty's Courts and Tribunals Service and it provides only one relevant power in the judiciary. In the circumstance that they are unable to provide an efficient justice system or the Lord Chancellor fails to provide for an effective and efficient justice system both the Lord Chief Justice and the Senior President have the power to address Parliament. Once that potential exocet is fired, and it never has been, the agreement and the partnership are dissolved. That is hardly an appropriate way of delivering or scrutinising the effectiveness of our justice system and its funding. Despite the excellent and collaborative manner in which the HMCTS Board has operated since its creation, the funding mechanism is no longer fit for purpose. Furthermore, any more comprehensive review of the justice system in the manner I suggest would be outside its remit.

Therefore, let us acknowledge that the scrutiny of the justice system that I am calling for requires a coherent concept of the Rule of Law which will include both normative and descriptive perspectives. We ought to be interested in which legal rules would create the best system and that involves value judgments about moral and political considerations as well as an analysis of what the law is and what its outcomes are. As the learned Professor HLA Hart is often paraphrased: '*for a rule to be valid the legal system of which the rule is a component must, as a whole, be effective*²⁵'. In sum, what is the common good? The impact of the law upon different communities with different values should not be under-estimated in any attempt to safeguard the Rule of Law if we are to enhance trust, respect and confidence in it. Outcomes matter. For example, it is wrong to give people rights if they cannot be accessed and enforced through a court or tribunal²⁶ and, just as importantly, the consequences of legislation and individual case decisions on the socio-economic well-being of people is a field of study that requires greater capacity and funding²⁷.

²⁴ HMCTS Framework Agreement:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts_framework_document_2014.pdf.

²⁵ Hart, HLA, *The Concept of Law*, (1961), 2nd ed Bulloch. PA and Raz. J (Clarendon Press, 1994).

²⁶ Neuberger, D, *ibid* at p. 16.

²⁷ *Nuffield Foundation Strategy, 2017-1022*, (Nuffield Foundation, 2017).

Experience of judicial leadership suggests that if legal decision-making is conflated with justice, such that its normative expressions are treated as absolutes, then neither politics nor socio-economic factors will be given sufficient attention and that would be a mistake. Although Sir William Blackstone, the Pembroke alumnus after whom this lecture is named, began his seminal work by declaring that *'English law derives its authority from natural law'*²⁸, it is perhaps fortunate that his subsequent account of the law is not always informed by the theory. Whether that is right or not, what I seek to underline is that our concept must provide a place for the pluralism of values that exist in our communities. To argue that there is only one set of goods that are, without empirical proof, objectively capable of being established through reason tends to diminish those already marginalised or excluded and that will tend to negate their access to justice. It is a convenient excuse to justify attitudes that the law should not condone. The ethical significance of successful outcomes depends on moral and political considerations not just legal or economic measures²⁹ and we should also be astute to remember that the workings of the Rule of Law are constrained by the fact that access to justice is limited to those who are able and can afford to litigate. If we start from Professor Rawls's proposition that *'we cannot know who is entitled to what until we first identify the principles of justice that should govern the rules we put in place'*³⁰, then we might achieve his description of:

*"A just scheme [which] answers to what men are entitled to; it satisfies their legitimate expectations as founded upon social institutions..."*³¹.

With one or two notable exceptions, no one limb of the State has been concerned to provide for the public an assurance, let alone reassurance, that the justice system will be or remain effective in and after the present crisis. In any event, one is entitled to ask how should the limbs work together to do that without compromising the separation of powers and the independence of the judiciary? That they can and should ought to be a given³². I would contend that there is an opportunity and a need to collaborate in the governance of the justice system beyond that which we presently do in the United Kingdom and that

²⁸ Blackstone. Sir W, *Commentaries on the Laws of England*, November 1765, (OUP, August 2016).

²⁹ For an account of the civic conception of the common good and the importance of respect see: Sandel.M, *The Tyranny of Merit, What's Become of the Common Good?* (Allen Lane, 2020) at pp 138-142, 208-212 and 224-227; A persuasive account of 'noble competition' as the mutual striving for excellence to reduce the incentive to behave unethically and thereby inform policy makers and guide them as they design laws can be found at: Stucke.M and Ezrachi.A *Competition Overdose, How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, (Harper Collins, 2020) at p. 259.

³⁰ Rawls, J, *A Theory of Justice*, (Harvard University Press, 1971) pp. 310-315.

³¹ Ibid at p. 311.

³² See for example: Neuberger, D, ibid at p. 23.

safeguarding the Rule of Law in and after a crisis depends upon the effectiveness of the measures we design to do that.

There are some who will regard the efficacy of a justice system, even or perhaps most particularly in a crisis, as being the sole prerogative of the Executive, but with respect to them, I profoundly disagree. Down that path lies the ‘Schmittian’ ghost of Executive dictat or extra-legal use of political power in an emergency³³. The proposition that the law cannot govern a state of emergency is politically dangerous and jurisprudentially superficial (with apologies to followers of Locke³⁴). It belongs to a time which the states of Europe, among others, will never want to re-visit and which other states would do well to avoid. I would rather posit the proposition that the Rule of Law is capable of responding when a crisis occurs but that the response requires the participation of the Judiciary, the Legislature and the Executive³⁵.

It is a function of the Judiciary in those States where the Separation of Powers and the Bangalore Principles³⁶ are in play to be astute in their scrutiny and protection of the Rule of Law especially, I would suggest, in a crisis. That function is part of their civic accountability and speaks to the legitimacy³⁷ of their constitutional function because it impacts upon and influences the perceptions and behaviours of those who we would expect to respect the law and have confidence and trust in its decision makers. The often fine distinction between the Rule of Law and the rule by law and the underlying policy of the former to interpret the latter by reference to principles that are the same in a crisis as is business as normal, is important. That has been acknowledged in this jurisdiction at least as long ago as the House of Lords decision in *Attorney-General v De Keyser’s Royal Hotel*³⁸, which clarified the basis upon which the power to requisition property for the purposes of the defence of the realm in the First World War was to be exercised.

³³ Schmitt, C, *Political Theology: Four Chapters on the Theory of Sovereignty*, tr Schwab, G, (Cambridge, Mass: MIT Press, 1988) at 5; Schmitt, C, *The Concept of the Political*, tr Schwab, G, (New Jersey: Rutgers UP, 1976), and Schmitt, C, *Der Huter der Verfassung*, (Berlin: Duncker & Humblot, 1985).

³⁴ [the] “power to act according to discretion for the publick good, without the prescription of the Law and sometimes even against it”: Locke.J, *Two Treatises on Government*, ed Laslett. P, (CUP, 1988) at p. 375.

³⁵ Dyzenhaus, D., *ibid* at p. 17.

³⁶ The Bangalore Principles of Judicial Conduct (2002)
https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

³⁷ I defer to the arguments of Professor John Tasioulas, the Director of the Institute for Ethics and AI at Oxford, and accept the limitations of the concept, if poorly defined, but would nevertheless invite an analysis of justice that I hope he would welcome and which is located within a persuasive vision for democratic renewal: Tasioulas.J, *Sumption on Law, Democracy, and Human Rights*, *King’s Law Journal*, 31 (3), pp. 467-479 (a critique of Sumption, J., *Trials of the State: Law and the Decline of Politics*, (Profile Books, 2019)).

³⁸ [1920] AC 508, resolving the question raised in *In re a Petition of Right* [1915] 3 KB 649.

There will undoubtedly be those who criticise my call to arms as ‘judicial activism’, and say that effectiveness is a policy matter for elected representatives alone. There are many good arguments for the division of functions between democratic representatives and judges and the dangers inherent in confusing the constitutional competence of the two but, I would suggest, those discussions avoid rather than focus on the needs of the Public, whom both the judiciary and our legislators serve, for example to have effective access to justice.

So, allow me to revisit the significance of a crisis for the justice system. I shall take it as read that we can acknowledge that a close analysis of individual judicial decisions during previous states of emergency reveals that there is at least a *prima facie* case that the judicial ability to test the validity of executive decisions can be compromised. The argument is that judicial behaviours amount to heightened deferential respect for the steps taken by the executive to protect against the risks inherent in the emergency³⁹. In that regard, the dissenting opinions of Lord Shaw in the First World War case of *R v Halliday ex parte Zadiq* and Lord Atkin in the Second World War case of *Liversidge v Anderson* are instructive. Some also argue that this can be discerned during business as usual. It is also plainly obvious that Parliamentary scrutiny of the Executive in a state of emergency needs to be robust, that is, enhanced not reduced to avoid the Rule of Law descending into rule by law. Parliamentary scrutiny of the detail of emergency regulations has been far from robust in this crisis⁴⁰ and as I shall demonstrate that is sadly not unusual. The existing regulations bear a sadly repetitive intonation of the mantra that ‘*the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make this instrument without a draft having been laid before, and approved by a resolution of, each House of Parliament*’. Parliamentary scrutiny in an affirmative resolution procedure is thereby avoided or delayed.

I am happy to acknowledge that there has been no example of which I am aware of the administrative courts in England & Wales, Scotland or Northern Ireland being unavailable during the present crisis to consider judicial review applications but as Lady Hale remarked in her lecture “.....it is surprising that there has been so little litigation to date...”⁴¹. She gave cogent examples of the ECHR rights that are engaged during lockdown and by regulatory restriction and where there has not as yet been any discernable remedy for those who appear to have a *prima facie* case. This is not the occasion to analyse those rights and whether

³⁹ Dyzenhaus, D, *ibid*; *R v Halliday, ex parte Zadiq* [1917] AC 260, and *Liversidge v Anderson*, *supra*.

⁴⁰ For a detailed analysis see Hickman, T., *Abracadabra Law-making and Accountability to Parliament for the Coronavirus Regulations*, (UCL, 17 November, 2020) and Hickman.T, *The Use and Misuse of Guidance during the UK’s Coronavirus Lockdown*, (UCL, 4 September, 2020).

⁴¹ Hale, B., *Law in a Time of Crisis*, *ibid* at pp. 10-19.

remedies should flow for the examples she gave. That is a fascinating topic which has been addressed in respect of pre-Covid caselaw by the persuasive analysis of Professors Abi and Jeremias Adams-Prassl in their recent paper on a conceptual framework for access to justice⁴². The argument they develop is, if I may be so bold, an excellent example of the normative analysis that is required of justice in a crisis.

There is, however, one right that falls fair and square in the centre of the debate that I want to have today and that is Article 6: the right to a fair trial. The right to a fair trial of one's civil rights and obligations or of any criminal charge is supposed to be within a reasonable time. The serious backlog of criminal cases in the Crown Court and the Magistrates' courts and the backlog of employment cases in the Employment Tribunals and family and civil cases in the Family Court and the County Court, raises a very serious question about effectiveness and access to justice during this crisis that will persist for some time after the pandemic has hopefully abated. These are systemic questions. Justice systems are matters for judicial leaders alongside their colleagues in Government and Parliament and it is a reasonable question to ask: what is the mechanism for that collaboration to work to resolve the access to justice problems that arise?

Let me now briefly highlight some of the experiences of 'justice in a crisis', simply to illustrate that change does occur and sometimes individual lessons are learned but rarely, if ever, is there a holistic analysis of outcomes so that we might all benefit from it. These are of course snapshot observations to interest the listener rather than analyses of all the circumstances that existed.

For example, in the context of the First World War, of necessity there was little or no planning of emergency powers. The first few months of war proceeded on the assumption that civil as distinct from military legal questions would carry on being provided for by 'business as usual'⁴³ with some protection for debtors who were unable to pay as a consequence of the war⁴⁴. That was rapidly overtaken by the effect of what became known as 'total war' which in the UK involved mass mobilisation, limitations to civil liberties, the requisition of private property, shipping, food and stores, restrictions on trade and contract and regulation of the production, distribution and pricing of food and other essential goods such as coal. This involved state control of and interference in the economy in ways and to an extent that many had never

⁴² Adams-Prassl, A. and Adams-Prassl, J., *Systemic Unfairness, Access to Justice and Futility: A Framework*, Oxford Journal of Legal Studies, 40(3), (Autumn 2020) pp. 561-590.

⁴³ (1914) 59 Solicitor's Journal 36.

⁴⁴ Courts (Emergency Powers) Act 1914 which provided a procedural remedy that the leave of the court was required to execute a judgment, foreclose on a mortgage or distrain for rent.

contemplated. The Defence of the Realm Acts were the primary vehicle by which Parliament authorised regulations (made by the King in Council) and by May 1917, around 206 Regulations had been issued under four Acts of Parliament⁴⁵. Conscription did not begin until 1916 and some economic protection for members of the armed forces then followed⁴⁶.

Perhaps because of the speed with which the initial emergency legislation passed through Parliament (it was commenced on 8th August 1914, only four days after the first declaration of war was issued against Germany⁴⁷) or because of an over-reaction to the emergency, the response of the legislature drew significant criticism. The Defence of the Realm Act 1914, the amendments made to it and its many associated regulations, vested in the military authorities jurisdiction to try civilians for 'defence of the realm' offences with neither the right to trial by jury nor any appeal against conviction or sentence by courts martial. The death penalty was available to a General Courts Martial (GCM) in the context that the GCM normally ordered the execution of those it convicted. The criminal justice system thereby created was increasingly regarded as unfit for purpose so that by March 1915 in response to criticism and debate including (importantly) among the then Law Lords, the right to jury trial was restored and the trial of civilians by the military authorities for other than the most serious matters came to an end⁴⁸.

There were some lessons learned from this crisis. The importance of process became a theme. Although it was not until after the end of the war that the House of Lords decided in *De Keyser* that the Crown had no legal or prerogative right to seize property without compensation, the Defence of the Realm Losses Commission was set up in March 1915 to settle claims arising out of the Crown's asserted exercise of its rights. Likewise, an Admiralty Transport Arbitration Board was set up in 1914 to set the rates for the hire of requisitioned shipping. There were also very limited insurance schemes for war damage; for example, for damage as a consequence of enemy bombing, which arguably paved the way for the War Damage Commission which was set up to pay compensation for bomb damage in the Second World War under the War Damage Act 1941. Private and family law perspectives began to

⁴⁵ Lobban, M., *The Great War and Private Law: Introduction*, Comparative Legal History, (2014) 2 (2). pp 163-183 ISSN 2049677X Hart Publishing (<http://eprints.lse.ac.uk/61612/>).

⁴⁶ Courts (Emergency Powers) (Amendment) Act 1916.

⁴⁷ The Home Secretary was given leave to introduce the Bill which was read for the first time, and ordered to be printed. It was then immediately read a second time, whereupon the House resolved into committee and the Bill "reported without amendment, read the third time, and passed" the entire procedure consuming no more than two columns of Hansard', per Ewing. K., *The Political Constitution of Emergency Powers: a Comment*, Int JLC, (2007), 3(4), pp. 313-318.

⁴⁸ See, for example: Swan, J., *The Defence of the Realm*, (2017) 181 JPN 249 and *The End of the War?* – (2018) 182 JPN 234 and Ewing, K., *ibid*.

change but the essence of the crisis was that business in support of the war effort was the purpose of successful State intervention.

The opportunities for *ex post facto* scrutiny and analysis may be obvious now but they were not taken in any significant way let alone systematically. At least one commentator has suggested that on the contrary what the United Kingdom did was to normalise emergency powers throughout the 20th Century⁴⁹. There existed not ad hoc powers that were swiftly removed but a developing source of continuing powers. My purpose tonight is not to analyse this proposition but to identify it as a potential factor in any scrutiny of what works and does not work. Furthermore, it is at least arguable that save for the provision of protection against debt recovery the law was relatively silent throughout the crisis. The limited statistics available from the courts of that period indicate that in 1918, there were 97,303 orders in the county courts under the Courts (Emergency Powers) Act 1914 (that is for economic protection) out of a total of 101,957 cases determined at a hearing⁵⁰ and the county courts heard only a quarter of cases in 1918 by comparison with 1913⁵¹.

I have already remarked that the social experience and practical circumstances that existed after the Second World War were in fact the catalyst for the creation of the welfare state but that the opportunity to consider reform of justice was not taken⁵². Let us not, however, underestimate the positive impact of legal aid over time. As anyone who has felt the adverse impacts of its removal (for example as a consequence of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)), there can be little doubt of the need for careful empirical analysis before policies that have that effect are enshrined in legislation. In a recent study undertaken by Professor Andrew Higgins⁵³ it was noted that eligibility for legal aid fell from 80% of the population when the system was created to 29% in 2007 and that was before the impact of LASPO. Lord Neuberger put it this way:

“Legal aid was available for a large number of people until about 1999, but from then on this aid has become harder to get and less available, and this has meant that it has become more difficult for ordinary people to litigate⁵⁴.”

⁴⁹ Ewing, K., *ibid*.

⁵⁰ Judicial Statistics, (1920), Cmd 831, I 515, at p. 29; Lobban, M., *ibid* at p. 18.

⁵¹ Lobban, M., *op cit* at p. 31.

⁵² Ryder, Sir E., *Slaying the Sixth Giant: the Changing Face of Justice*, (28 November 2019); www.pembroke.ox.ac.uk/master/speeches.

⁵³ Higgins, A., *The Cost of Civil Justice and Who Pays?*, (2017) 37 OJLS 687, 689-691.

⁵⁴ Neuberger, D., *ibid* at p. 16.

There was one interesting innovation during the Second World War that arguably was a lesson learned from history, namely from the Fire Courts of 1667 to 1676 to which I will come in a moment, and that was the reduction in the size of juries to seven persons. Civil justice in England and Wales had persevered with the civil jury despite the success of the Fire Courts experiment but in 1939 Parliament enacted the Administration of Justice (Emergency Provisions) Act which removed the right to trial by jury in a civil cause unless the court or a judge was of the opinion that the question should be tried by a jury⁵⁵. The First World War error of dispensing with the jury in an indictable criminal matter was not repeated. Save in respect of the trial of a person charged with murder or treason or where the court or the judge was of the opinion that the gravity of the matters in issue necessitated otherwise, any jury, whether criminal or civil, would no longer need to consist of more than seven persons and the age limit for service was increased to 65 from 60⁵⁶. If I may be permitted to express a personal opinion, that was a sensible, pragmatic and principled approach that remains as relevant to the circumstances we face in this crisis as it was to the different circumstances experienced, globally, during the Second World War.

That takes me in chronological terms to the most recent two crises that are pertinent to the argument: the financial crisis of 2008 and the current Covid-19 crisis.

I have already cited an example of the concern felt by senior judges after the financial collapse of 2008 and the impact serious cuts in funding were having on the justice system in England and Wales. They included lengthy delays that were inimical to justice, process and language that were unintelligible to all but the specialist user and a system that was so costly that the only solution to date had been to limit funding by the removal of legal aid. The context was austerity that ran the unacceptable risk of the price rationing of justice. For once the judiciary and government acted, although it has to be said there was no alternative. A far-reaching programme for the modernisation of courts and tribunals was proposed and the Lord Chief Justice, Lord Thomas, the then Lord Chancellor, Michael Gove MP and I, then Senior President of Tribunals, entered into an agreement⁵⁷. The judiciary subsequently published their strategic plans⁵⁸. The purpose of the programme was and is to give the administration of justice in England and Wales a new operating model with a sustainable and affordable

⁵⁵ Section 8(1) of the 1939 Act.

⁵⁶ Section 7 of the 1939 Act.

⁵⁷ *Transforming our Justice System*, (September 2016): <https://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf>

⁵⁸ The strategy for the tribunals is summarised in a report to the Lord Chancellor and Parliament: Ryder. Sir E, *The Modernisation of Tribunals*, 2018: A Report by the Senior President of Tribunals (London, 2018)

infrastructure to deliver better services at lower cost in order to safeguard the Rule of Law by improving access to justice. It was costed at £1Bn and if carried through to completion will involve the most ambitious reforms in process and procedure since the Judicature Acts of the 1870s. The programme is work in progress.

Turning then to the pandemic. You will recollect that whatever warning others may have had, the general public, and for that matter those involved in the justice system, had about as much time to prepare for the onset of Covid-19 as those who experienced the declaration of war in the First World War. In my former jurisdiction, the Tribunals of the United Kingdom, we went remote and online overnight at the beginning of the first UK lockdown, eleven months ago. We sent our judges, members and staff home to protect their safety as buildings closed but we resolutely refused to close down our sittings. We guaranteed that the jurisdictions that were a priority for the vulnerable would remain available (for example asylum, mental health, special educational need, asylum support and benefits appeals, that is jurisdictions dealing with detention, welfare and destitution). We identified the urgent remedies that would remain available. We developed, with Government, Parliament and as many interested parties as we could (for example through the Administrative Justice Council and Tribunals Procedure Committee), new rules and practice directions, 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 willing to participate in research and scrutiny about what worked and what did not. I reported on what we had achieved to the UK and devolved Parliaments and to Government Ministers⁵⁹. 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.

I do not propose to answer Lord Sumption's excoriating analysis of Government by Ministerial dictat in the context of an allegedly supine Parliament that is contained in his Freshfields Lecture⁶⁰. Some of the issues he raises are, with respect, clouded by hyperbole, whereas others appear unanswerable and worthy of very serious concern. That is not because they are irrelevant to the subject matter, but because they are an indictment of several charges that in any review of the pandemic must be heard. This is an important question but one that

⁵⁹Ryder. Sir E, *Annual Report of the Senior President of Tribunals 2020*, (London 2020).

⁶⁰Sumption, J., *ibid*, fn. 17.

should not delay or substitute for the need for a review of the justice system even though some conclusions would be of central relevance to what works.

It remains to be seen whether the direct form of strategic leadership and collaborative partnership with the legislature and the executive which we pioneered was as successful as we hoped it would be in terms of outcomes and also whether the changes that we introduced are sustainable, but at least we attempted to ensure that effective access to justice was facilitated. Some elements have worked well and the long term availability of bespoke remote hearing software and new end to end digital process and software has been advanced beyond what was imaginable a year ago.

I promised that I would return to the example of the Fire Courts. The recent revival of interest in a previous plague and the great fire of London that followed it are interesting. The rebuilding of London after the Great Fire benefited from legislation supported by the judiciary at the time, the Crown and the City: the Fire of London Disputes Act 1667 and the Rebuilding of London Acts. As Professor Jay Tidmarsh has recently commented⁶¹, it created a unique court system that had never been tried before. There was a single Chamber of twelve judges, any three of whom could hear a case, or seven an appeal. A jury could be empanelled, but in practice that never occurred. The procedure was simple and without formality (*sine forma et figura iudicii*): a major change in an era of complex written pleadings and the judges waived their personal fees (for which they were each gifted a portrait by the City many of which survive in and around the Royal Courts of Justice in London). The underlying principle was to proportionately allocate the share of the loss between proprietors, landlords, tenants and occupiers. There were 1,585 determinations or decrees each comprising up to four properties. The court's sunset clause was extended and it eventually sat for nine years hearing its last case on 18th February 1676. Most cases were heard and determined on the day: again a major innovation. The model was subsequently used for other fires. It was an agile form of adjudication that today might be thought to be closer to facilitation but none the worse for that. It was investigative and equitable.

The description of what worked ought to remind us of our recent experience during Covid-19, at least so far as the UK Tribunals are concerned.

⁶¹ Tidmarsh, J., *The English Fire Courts and the American Right to Civil Jury Trial*, University of Chicago Law Review, vol. 83, no. 4, (2016), pp. 1893-1941, summarised in a number of recent radio interview and at the Selden Society of the Inner Temple.

Conclusions

In conclusion, I suggest that a justice system has an obligation to be more transparent and capable of scrutiny in a crisis, not less. It must involve greater collaboration between the limbs of the state, to ameliorate immediate harm and provide the urgent remedies that people need. Positive lessons have been learned and these should be openly discussed 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 control of the process than the advocates, or the parties. They will not be appropriate for all jurisdictions. There are other suggestions that have not been trialled but which should be considered such as the limitation on the size of the criminal jury or the creation of an intermediate criminal court⁶². They deserve to be trialled, scrutinised and be subjected to research to establish good practice in their use. Some of the lessons of history should be re-visited. 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.

There is another lesson from the pandemic. Without the ability to “*encounter one another in common spaces and public places*”⁶³ to debate our common purposes, our institutions degrade and our sense of common interest reflected in cohesion and solidarity of purpose will fray or decline. Those places should be in Parliament, in cabinet Government and in our courts and tribunals but there is a further obligation on all three limbs of the State that they collaborate to provide justice systems during and after a crisis that are accessible and there ought to be a public environment for that collaboration and debate.

If Government is not interested in a systemic review of the effectiveness of our justice systems, then there are others who could step up to the plate. Attending this lecture tonight are former colleagues who are or recently have been fellow chief justices, some of the most accomplished legal scholars and practitioners at home and abroad and those who have an interest in improving socio-economic outcomes through justice, whether in politics or the law. Wherever the Commission for Justice eventually sits, that there is a need for it is patent and

⁶² Auld. Sir R, *Review of the Criminal Courts of England and Wales*, (September, 2001).

⁶³ Sandel.M, *ibid*, at p. 227.

the opportunity should be taken to improve the ways in which we safeguard the Rule of Law and provide effective access to justice.

Thank you⁶⁴.

{7655 words}

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Master

Pembroke College, Oxford

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