

# Tomorrow's Lawyers Today – Today's Lawyers Tomorrow

## 80 Club Lecture, Association of Liberal Lawyers

**Lord Neuberger**

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### **(i) Introduction**

1. It is a pleasure to have been asked to give this year's 80 Club lecture<sup>1</sup>. As the chairman has just reminded us, the 80 Club was created after the Liberal Party won the 1880 General Election. As a consequence of that victory Lord Selborne became, for the second time in his career, Lord Chancellor. That bygone event may well appear to have more to do with the lawyers of the day before many yesterdays rather than with the topic of tonight's lecture. Contrary to first impressions, however, it does have a bearing on the issue of tomorrow's lawyers today and today's lawyers tomorrow.
2. Selborne had previously been appointed Lord Chancellor in 1872 when reforms to the courts and judiciary were very much in the air. Those reforms had a number of important features. They involved the creation of the High Court and Court of Appeal of England and Wales. They also involved the abolition of the judicial functions of the House of Lords, at least in respect of England and Wales. That reform was undone before it came into force, and it would be more than a hundred years before the judiciary was finally separated from the legislature. But that is another story.
3. One hundred and forty years separate us from the Judicature Act 1873, which effected those reforms, and they were pretty eventful years, so it is easy to forget just how radical those reforms were. They swept away the great common law courts, the Courts of Common Pleas, of Kings Bench and Exchequer, as well as equity's great Court of Chancery. They effectively abolished a historic branch of the legal profession – the

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<sup>1</sup> I wish to thank John Sorabji and Cameron Sim for all their help in preparing this lecture.

Serjeants-at-Law. And they finally killed off the forms of action, which since at least the 11<sup>th</sup> Century had been the basis of actions at law and had shaped the common law's development.

4. These reforms had been a long time coming. They were the result of work carried out by a Royal Commission established in 1867. Despite the relatively lengthy gestation period and detailed consideration, I have no doubt that these reforms were met with a good deal of concern about how they would turn out; about what tomorrow would be like for the Victorian lawyers and judges and their soon-to-be Edwardian successors.
5. It is perfectly natural to be suspicious of change. After nearly 40 years of legal experience, the law of unintended consequences is the most reliable piece of virtual legislation I know. And *if it ain't broke, don't mend it* is an adage which has much to commend it. Having said that, the pressures from changes in social, moral and political values, coupled with technological developments, mean that changes are often not merely unavoidable but beneficial. It is only human to be suspicious of reforms to a business, industry or profession from which one derives an interesting job, a position in society and a good income. As Dan Gardner has elegantly put it, "*Self-interest and sincere belief seldom part company*"<sup>2</sup>, and that is as true of judges and lawyers as it is of any other group. It is not for nothing that it was supposed to have been a Chancery Judge who said "*Reform? Reform? Aren't things bad enough already?*"<sup>3</sup>
6. Those involved in the law have been living through fifteen years of reforms, reforms which are still on-going and which, at least from our perspective, appear to be of an even greater magnitude. The Rules of Court introduced by the 1873 Act (courtesy of Lord Selborne), to govern all civil litigation, have been swept away following Lord Woolf's proposals, and replaced with new Civil Procedure Rules. Many fundamental reforms were made by the Constitutional Reform Act 2005. Thus, the legislature has created a Judicial Appointments Commission to replace the long-established tap on the shoulder method of judicial appointment. The Law Lords have vacated the House of Lords, moving across Parliament Square to the Supreme Court. The office of Lord Chancellor is now that of a

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<sup>2</sup> Dan Gardner *Risk: The Science and Politics of Fear* (Virgin Books, 2008) at 166.

<sup>3</sup> Mr Justice Astbury, although I believe that the words have also been attributed to another, more famous judge, Lord Eldon, and also to Lord Liverpool.

Minister of Justice, while the Lord Chief Justice has become the head of the judiciary of England and Wales. The courts system was taken over by a sort of partnership between the judges and the Ministry of Justice, called Her Majesty's Court Service (or HMCS).

7. That is by no means the end of the recent major reforms, as some of the reforms are being or have been themselves re-reformed. The judiciary has massively expanded through incorporating the Tribunal judges; so HMCS is now HMCTS. Parliament is about to make some further reforms to the judicial appointment process only eight years after it was put on a statutory footing. Parliament is also introducing a single Family Court in England and Wales, and is seeking a radical overhaul of family justice. Lord Woolf's new CPR are undergoing radical surgery as a result of Lord Justice Jackson's proposals to mitigate the costs of civil litigation, and those proposals include the introduction of contingency fees, previously unlawful.
8. And while all this has been going on, Parliament and the Ministry of Justice have been embarking on a programme of radical reform of the legal profession following the 2004 Clementi Report. This reform involved sweeping away self-regulation of the profession under the scrutiny of the judiciary, with regulation by the Legal Services Board and a group of other regulatory bodies. And other legislation has now introduced alternative business structures and non-lawyer investment in legal practices.
9. Scotland has, to a degree, followed suit and also enacted Clementi-inspired reforms, which have introduced Alternative Business Structures and external investment in Scottish law firms<sup>4</sup>. It too is in the process of reforming its courts, following the Gill Review. Wales may also be considering reform, as is witnessed by the Welsh Assembly's recent consultation on establishing a separate legal jurisdiction in Wales<sup>5</sup>. At the European level, after a record-breaking gestation period, the Unified Patent Court has

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<sup>4</sup> The Report of the Scottish Civil Courts Review Vol. 1 and 2 (<http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review>); Legal Services (Scotland) Act 2010.

<sup>5</sup> Inquiry into a Separate Welsh Jurisdiction and Report (December 2011 and December 2012) <<http://www.senedd.assemblywales.org/documents/s5517/A%20Separate%20Welsh%20Jurisdiction%20-%20Call%20for%20Written%20Evidence.pdf>; <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/cr-ld9135-e.pdf?langoption=3&ttl=CR-LD9135%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20-%20Inquiry%20into%20a%20Separate%20Welsh%20Jurisdiction>>.

finally been agreed upon, and will soon adjudicate disputes relating to European Patents<sup>6</sup>. The Brussels Regulation, after a three-year reform process, has finally been revised and will take effect in two years' time.

10. And, as all this was going on the wider world was not standing still: far from it. While internet companies went from dot-com boom to bust, the internet was emerging as the most profound force for change since the Industrial Revolution. And, of course, we have had five years of financial crisis, which, with its consequences to government expenditure, will continue to significantly impact on the justice system for some time to come. We have seen courts being closed for the first time in a generation, and we are seeing substantial cuts in legal aid, both the direct and regrettable (if understandable) result of the severe constraints on government expenditure.

11. Given all this, the questions that no doubt faced Selborne and his contemporaries are ones that face us now even more starkly: what might the world look like for tomorrow's lawyers? What might it look like for today's lawyers facing tomorrow?

**(ii) The future's uncertain . . .**<sup>7</sup>

12. Professor Richard Susskind has spent a considerable amount of time considering the future of law and lawyers. In his most recent book, *Tomorrow's Lawyers*<sup>8</sup>, he says this,

*'Wayne Gretzky, perhaps the finest ice hockey player of all time, famously advised to 'skate where the puck's going, not where it's been.' Similarly, when lawyers are thinking about the future, whether about their law firms or law schools, they should be planning for the legal market as it will be and not as it once was. In ice hockey terms, however, most lawyers are currently skating to where the puck used to be.'*<sup>9</sup>

It is a good metaphor: if you are pursuing a moving object, you should aim to intercept it along its trajectory, not at its point of departure. If we want to consider the issues that may face tomorrow's lawyers, we should not simply focus on what the world is like

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<sup>6</sup> <<http://register.consilium.europa.eu/pdf/en/12/st16/st16351.en12.pdf>> .

<sup>7</sup> Pace, *The Doors, Roadhouse Blues*.

<sup>8</sup> R. Susskind, *Tomorrow's Lawyers – An Introduction to Your Future* (Oxford) (2013).

<sup>9</sup> R. Susskind (2013) at xviii.

today: that must of course be our starting point, but our real focus must be on the world as it is going to be tomorrow.

13. The metaphor is predicated on an expert knowing where a hockey puck is likely to be, given his knowledge of where it is and various basic scientific principles or rules. If you know, or intuitively understand, the rules, you are more able to anticipate the likely outcome. It is the same, of course, for lawyers. A good lawyer in command of the facts and of the applicable law should, to a reasonable degree, be able to predict the outcome of litigation. There are, of course, imponderables which might frustrate the prediction: the cantankerous judge who just won't see the force of your brilliant argument; your opponent's unexpected telling point in cross-examination which holes your case; your witness who doesn't come up to proof. By and large though, the more skilled the lawyer, the better the prospect that their analysis of a case will be borne out in the result.
  
14. Gretzky's prediction is however based on a stable situation. It is an instance of what the late Thomas Kuhn called normal science: the routine application of rules within an established paradigm. The problem for its application to the question of what the world might be like for tomorrow's lawyers is that to a very large degree we seem to have left the realm of normal science. In Kuhn's terms, we appear to be in a period where we are undergoing a paradigm shift, where many of the rules, the norms which we have taken for granted for so long, are coming under sustained pressure, and new rules and norms are likely to take hold.
  
15. In this we seem to be different from Lord Selborne and his Victorian contemporaries: their reforms, while very significant, appear to have been built upon a steady series of reforms, which were, in the words of Professor Michael Lobban, carried out in a manner that was '*slow and complex*' and '*driven at different times by different people*'.<sup>10</sup> They were refinements and evolutionary developments, driven to some extent by the need to reform our justice system in the light of wider societal changes, which were rendered inevitable by the transformation from the late 18<sup>th</sup> through 19<sup>th</sup> centuries. During that period, British society moved from a predominately rural, agrarian economy to an urban, industrial one.

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<sup>10</sup> M. Lobban, *Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery Part 1*, (2004) 22 Law & Hist. Rev. 389 at 399.

16. The growth of the railways, the development of mass production, the birth of the limited company, the invention of the telegram and then the telephone, all reshaped society. In turn the law was reshaped: Carbolic smoke balls promised to cure the flu, but in the event gave rise to a foundational case in contract law<sup>11</sup>; Rylands and Fletcher got into a dispute over damage caused by flooding mill water from a reservoir and created a new strict liability tort<sup>12</sup>; Mr Salomon's business difficulties resulted in recognition of corporate personality under the then Companies Act 1862; mass production and the growth of consumer goods, unsurprisingly, saw the need to codify the law relating to sale of goods and put it on a statutory footing in the Sale of Goods Act 1893.
17. All these and other such changes, just like the reforms to the justice system and legal profession, came over a relatively long period of time. Law changed incrementally as society evolved over the century. A Victorian Wayne Gretzky of the law would have had an easier time predicting what the future held for 19<sup>th</sup> century lawyers. The creation of the High Court and Court of Appeal of England and Wales, for instance, might well have looked like a radical departure from what went before. In fact, as we can now see, it simply merged the Common Law courts and renamed them as Divisions of the new High Court; an inheritance we still live with today, notwithstanding an intention in the 1870s that when the new system had had time to bed in – when the lawyers had got used to the reform – a more fundamental restructuring would take place. There was no revolutionary break: no paradigm shift.
18. We are, some would say, in a much more revolutionary phase of development, than that experienced in times past. This is the case for at least three reasons, which I have already mentioned. First, the sheer number of far reaching recent reforms, which seek to modernise the justice system and to open up the legal services sector. Secondly, there is the effect of the Internet. Thirdly, there are the severe constraints on government expenditure.
19. That said, I ought perhaps to pause and raise the question whether the changes we are experiencing are, in fact, so much more profound than those experienced in the past.

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<sup>11</sup> *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256.

<sup>12</sup> *Rylands v Fletcher* (1865) 3 H & C 774; (1866) L.R. 1 Ex. 265; (1868) LR 3 HL 330.

Changes always appear more radical, often far more radical, at the point of their introduction than after they have been implemented - with the benefit of hindsight. A revolutionary proposal, which appears to threaten the very fabric of society, quickly becomes part of the established warp and weft of that very fabric. So, when considering the significance of any proposed or recent changes, we should be wary not to exaggerate their extent and impact.

20. In many areas of life, the cry of “this time it’s different” must be viewed with considerable scepticism – particularly given that that was the cry one heard in the financial world in the heady days of 2006 and 2007<sup>13</sup>. But even allowing for this, I think that there is real validity in the view that the present reforms to the legal landscape, coupled with technological changes, are more monumental than the reforms of the 1870s. What is remarkable at present is that there are so many changes taking place at the same time. That may largely be a reflection of the fact that the pace of societal change has quickened. The increased confluence of change means that, as reforms are made to one area of our legal system, so must reform follow immediately in another, lest we allow some areas to decay whilst others flourish.
21. From the point of view of the legal professions, the recent reforms were intended to be revolutionary: we have now broken away from the centuries old tradition of self-regulation, and are also in a brave new world in which lawyers have far more freedom when it comes to structuring their businesses. Unlike the position in Lord Selborne’s day, the reforms were intended to disrupt the status quo: to advance the cause of consumerism, and to breed innovation and radical change. As for the internet, it may not have been intended to be a revolutionary force when it was a twinkle in Sir Tim Berners-Lee’s eye, but as every blog, tweet, Wikipedia entry, smartphone, and High Street closure demonstrates, it is proving to be a truly singular force for change. It is without doubt, as Professor Christensen of Harvard Business School has said, a truly disruptive technology, in that it has the power fundamentally to transform a market, or in this case, a profession and the way it works<sup>14</sup>.

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<sup>13</sup> C. Reinhart and K. Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton University Press, 2009).

<sup>14</sup> C. Christensen, *The Innovator’s Dilemma*, (Harvard Business School Press, 1997) cited in R. Howe, *The Impact of the Internet on the Practice of Law: Death Spiral or Never-Ending Work?*, 8 Va. J.L. & Tech. 5 (2003), at 8 <<http://www.vjolt.net>>.

22. Again, I may be guilty of being over-influenced by the present nature of the changes, but I think that the combination of the driving factors for change which currently exist render the future development of the law and legal practice more uncertain than it probably ever has been. If, for instance, barristers and solicitors could not enter into partnerships, as they can via ABSs, or enter into business with non-lawyers, or seek external investment, any developments engendered by the Internet would have been limited by the existing regulatory and professional structures. The greater opportunities for development presented by regulatory and professional reform in turn open up the prospect for less-structured, less-restricted, Internet-inspired development than would otherwise have been the case.
23. This takes me back to Wayne Gretzky and his advice to skate to where the puck is going. Given the intersection of regulatory reform and the growth of the Internet, all taking place at a time of acute economic crisis, it is very likely that we simply do not, indeed cannot, know for sure where the puck – where legal services – are headed. Writers, such as Professor Susskind, have given some real thought to where we might be headed. Some of his ideas represent what Kuhn would have called an application of normal science, but, even so, the implications may be enormous. He suggests that in the future we will have lawyers who are specialist ODR – Online Dispute Resolution – practitioners. In a sense, that means no more than that today’s lawyers will tomorrow need to refashion their ADR practices into ODR ones<sup>15</sup>. However, the implications may be considerable: will an advocate never see his or her instructing solicitor, lay client, opponent or arbitrator; or will it all be on-screen? And how will that affect advocacy and adjudication?
24. Equally, the suggestion by Professor Susskind that we are likely to have ‘*legal knowledge engineers*’ is in reality no more than the claim that today’s professional support lawyer – an integral part of very many law firms – will still be around in a digital future<sup>16</sup>. Again, it is an application of the present in the future. But because so much information will be readily accessible and readily processable, will support lawyers assume a more important role than heretofore?

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<sup>15</sup> R. Susskind, *ibid*, at 115.

<sup>16</sup> R. Susskind, *ibid* at 111.



25. We are more than likely to see a number of changes that we can currently barely grasp. We live in a world where not so long ago, for example, the default means of serving a writ was to hand deliver it. Then the post intervened. Now we can serve claims (no longer a writ) via Facebook and Twitter. But again, this is all so easily predictable. It is, to borrow a phrase, the unknown unknowns that will shape the future. With that in mind, my advice to the Wayne Gretzky's of the law would be to say that where the future of the profession is concerned, Niels Bohr, the great physicist (and keen footballer, if not hockey player), is probably as good a guide as any. He famously commented that prediction is very difficult, especially about the future.
26. With that cautionary note in mind, I turn to consider how we might expect and want our justice system and legal professions to develop. While the future may be uncertain, we can still consider what we would want it to look like and then see how we can utilise the tools at hand to bring about that future. We do not have to be passive recipients of change. Indeed, we owe it to future generations to consider the possibilities presented by regulatory reform, changes to the justice system, financial constraints and technological innovation, and to consider how they can be harnessed to promote our commitment to justice and the rule of law.

### **(iii) Shaping the future**

27. The starting point for any consideration of what we might want to achieve through the opportunities presented by reform and innovation has to be the rule of law and its effective implementation. Just because we are living through one of those rare periods where radical change is taking place, it does not mean that we cannot or should not seek to influence and guide such change.
28. Let me start by stressing a point that I have made before and which I make no apology for making again. The historic justification, and primary duty, of any civilised government is to ensure the defence of the realm and the rule of law at home – i.e. to ensure its citizens are free from both foreign and domestic threats. If it cannot provide those timeless and fundamental features, a government is not worthy of the name, and all its other more headline-grabbing services, which are of far more recent origin, such as education, health, and welfare, become valueless. Securing the rule of law at home requires, amongst other things: an independent, impartial, and properly resourced judiciary; an equally properly

resourced and accessible court system; and a robust, independent legal profession. It requires judges whose expertise and integrity is beyond question. It requires lawyers of ingenuity, whose skills and experience are as well developed as their integrity and character.

29. Reform cannot therefore take place in a vacuum. It must take place against, and be shaped by, a background of values and commitments, the most fundamental of which have recently been formally acknowledged by Parliament. The 2005 Constitutional Reform Act imposes a duty on the Lord Chancellor to uphold the continued independence of the judiciary, which expressly includes the need for judges to have the necessary support to exercise their functions. The 2007 and 2010 Legal Services Acts both specify as one of the fundamental objectives of regulation of the legal professions is that it supports the constitutional principle of the rule of law, and they require such regulation to be carried out in the public interest and with a view to promoting a strong, independent and diverse legal profession.
  
30. Market liberalisation, through external investment in legal practices or through the development of ABSs, cannot properly therefore result in a free-for-all. Effective, principled, regulation will need to operate as a break on any commercial pressure on lawyers to act in ways contrary to the public interest, the rule of law, or their clients' interests, however subtle or unstated, from external investors in legal practices. No one is so foolish as to suggest that such commercial pressures have not historically existed. Those pressures were, again historically, modulated by a professional ethos and a commitment by lawyers to professional principles, and by duties owed to the court. Such a professional ethos cannot be assumed to be in the forefront of the minds of hard-nosed businessmen who want to maximise a return on their investment. The regulatory bodies will need to work hard to ensure that such pressures are minimised and neutralised. If they fail to do so, and allow a culture of conflict to arise and one where that conflict is quietly resolved in the investors' favour, we run the risk of losing a properly robust and independent legal profession. Independence, in this context, does not simply mean independent of government.
  
31. The legal profession reflects society: that is both appropriate and inevitable. Society has become more unequal over the past thirty-five years, and this development can be seen in

the field of legal services. City firms of solicitors and commercial sets of barristers chambers have done well, many of them spectacularly well, as a result of London's justified reputation as the world's most respected and expert international and commercial legal centre. Multi-national companies and foreign multi-billionaires litigate and arbitrate here. In their case, cost is of little importance. How different it is for 95% of the citizens of this country, for whom the cost of legal proceedings must often seem prohibitive, and who, as potential litigants, are mostly faced with the horrible choice of not seeking justice or risking bankruptcy. People contemplating civil, and even family, litigation who can look for support to an ever-shrinking legal aid system are increasingly few and far between. Of course, conditional and contingency fees partially plug this access to justice gap, but they are very much of a *pis aller*.

32. The legal profession must also remain independent of, let alone transform into, a system of unreflective consumer fundamentalism<sup>17</sup>. In enabling change, we must be sure to maintain respect for the legal system and the rule of law. The legal system exists for the benefit of society as a whole, not just for consumers of the system. Our attitude to online dispute resolution, the introduction of ABSs, and any future developments along similar lines, must be shaped by strict adherence to high professional and ethical standards. Whilst some changes to our legal system are, and will be, very considerable, they should not alter the fundamental requirements of our system. The public interest must always take precedence over, and indeed must remain beyond the reach of, the unyielding tentacles of self-interest.
33. The strength of a society's commitment to the rule of law is sharply reflected by its ability to secure a fair trial for those charged with criminal offences. Such individuals have the entire weight of the State ranged against them. Whether guilty or innocent, each one of them is owed due process. Everybody is entitled to the protection of the law and nobody is above the rule of law, whether accused of crime, whether a victim of crime, whether a witness, or whether prosecuting or defending – or, I might add, judging.

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<sup>17</sup> D. Neuberger, *The tyranny of the consumer or the rule of law* (Speech at the 25<sup>th</sup> Annual Bar Conference, 8 November 2010) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-speech-bar-conference-lecture.pdf>>.

34. With this in mind, we cannot afford to undermine the strength of our criminal advocates and solicitors. We have a duty to ensure that those lawyers who specialise and practise in this field are properly able to do so. A robust, independent legal profession requires robust, independent criminal law practitioners. Without this, our society takes a fatal step away from the rule of law. It is why we provide criminal legal aid. It is why we have the cab rank rule, notwithstanding its continued existence being questioned by The Law Society in 2010<sup>18</sup> and, more recently, by the Legal Services Board<sup>19</sup>.
35. The requirement that a properly qualified advocate cannot refuse instructions presented on the basis of a reasonable fee to represent an individual in court is the means by which we guarantee robust and independent representation for all, even those accused of the most heinous crimes. It protects the lawyer from adverse influence, from public opinion, from improper pressure from the media or the State itself. While it is an aspect of the rules of professional practice of barristers in England and Wales and Northern Ireland, and advocates in Scotland, it is more than that. As Lord President Inglis put it in a case in 1876<sup>20</sup>, it is a rule of law, and remains so today. It can readily be understood why Lord Hobhouse described it as a '*constitutional safeguard*' of the independent advocate's duty to secure justice<sup>21</sup>.
36. In the years to come, we are going to have to take great care to ensure that regulatory reforms, and the restructuring of legal businesses, do not reduce the number of quality lawyers who carry out criminal work or reduce the status of the cab-rank rule. It is easy to see how this might happen. An external investor in a legal business may well want the firm only to carry out the most remunerative work. This might raise the question of discontinuing work, such as criminal defence work in order to concentrate on more profitable civil work. Equally, pressure may arise for the cab-rank rule to be relaxed. Should this begin to come to pass, it will be of real importance for the regulators to ensure that legal practices are regulated so as to further this aspect of the rule of law. The brave new world of ABSs and Co-Op law, and other economic pressures may also give rise to

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<sup>18</sup> BSB, Summary of Responses to 2010 Consultation at 28.

<[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/bsbcabrankruleanx4\\_7.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/bsbcabrankruleanx4_7.pdf)>.

<sup>19</sup> J. Flood & M. Hviid, Report to the Legal Services Board, *The Cab Rank Rule* (January 2013) <[https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule\\_final-2013.pdf](https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf)>.

<sup>20</sup> *Batchelor v Pattison & Mackersy* (1876) 3R 914 at 918.

<sup>21</sup> *Medcalf v Mardel* [2003] 1 AC 120 at [51] – [52].

similar threats to the quality of legal services in the civil and family fields, and such threats must be seen off.

37. The essential point is that we need to be cautious in so far as our new regulatory arrangements are concerned. They offer the basis for innovation, and for improving the provision of legal services. But equally they pose risks that we cannot afford to underestimate. Those risks must be mitigated by ensuring that reform takes place consistently with our commitment to the rule of law, to the public interest and to ensuring effective access to justice through a robust, independent legal profession.
38. The regulatory structure provided by the 2007 and 2010 Acts ought also to play a guiding role in so far as the impact of technological developments is concerned. Properly used technology has for some considerable time now been utilised by law firms to render their systems more efficient; reducing the time taken for work to be done and thereby reducing cost. This will undoubtedly continue in a number of ways.
39. Technology has, for instance, led to the growth of legal outsourcing and off-shoring. The former refers to the contracting-out of services provided by law firms to third parties, who may be based in the same country as the law firm or in another country. This encompasses work such as reviewing documents, drafting statements of case (and by this I don't refer to solicitors instructing barristers to draft them, but rather solicitors contracting the work to companies, to lawyers, based outside the UK), and reports on title. Off-shoring refers to the practice of transferring work to other countries, albeit to an office of the law firm specifically established in the foreign jurisdiction to carry out the work.
40. In both cases the aim is to increase efficiency and reduce costs. It has been generally anticipated that such developments would become increasingly common, not least because documents can easily be stored and accessed throughout the world via cloud computing. They will benefit law firms and their clients. The issue that arises in respect of the use of such technology is to ensure that it does not undermine professional or ethical standards; that it does not undermine client confidentiality. In this, again, the rule of law must be our guide. It may be that off-shoring is a temporary exercise; a recent

study<sup>22</sup> has shown that manufacturers at least are starting to come back home, or to “reshore”, but with multinational law firms, with more working at home, and with increasing document sharing, there is no doubt that confidentiality must be closely watched.

41. How though can we ensure that technology can be harnessed to facilitate more than just efficiency and reduction in cost? How can we ensure it more directly furthers the rule of law?
42. First, we could utilise it to support our commitment to efficient justice. Proper use of technology could ensure that all proceedings are issued electronically; that statements of case and skeleton arguments are submitted electronically; that disclosure is conducted electronically. Such increased efficiency could be used to improve access to justice by enabling reductions in court fees. Secondly, technology could be utilised to support our commitment to open justice, namely by ensuring that the public has proper access to court documents. This already occurs in other jurisdictions – for instance in the United States by its federal judiciary through PACER: Public Access to Court Electronic Records. This enables public users, for a notional fee, to obtain case information through an internet-based service<sup>23</sup>.
43. Thirdly, we should try to ensure that in due course we only use E-bundles and that legal authorities are only supplied electronically. We should also be considering how we could restructure our courts and our court systems so they can operate fully electronically. This would inevitably require some capital investment. However, difficult though it may be to get this message across to an increasingly cash-strapped government, investment in the immediate term will not only produce cost and efficiency savings in the medium-to-long term, but it will more as a consequence help to secure effective access to justice in the 21<sup>st</sup> century. Those cost-savings, including funds raised through a home-grown version of PACER, could then be properly deployed back into the justice system to help fund legal aid.

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<sup>22</sup> “*Reshoring manufacturing: Coming home*” The Economist, 19 January 2013.

<sup>23</sup> <<http://www.pacer.gov>>.

44. Fourthly, we should be using technology to improve public access to legal advice. In an age of austerity, which has put real pressures on Citizens Advice Bureaux, our commitment to free legal advice for the public is under severe pressure. We live in a world of Skype and Facetime, of phones and computers with built-in cameras. In many cases, there is no reason why free legal advice always needs to be delivered in person. Of course, this is not to suggest that free legal advice should always be delivered through other means. There remain obvious benefits in meeting face-to-face with a legal advisor, particularly for vulnerable members of society, who may be less familiar with, and perhaps intimidated by, the legal system. Equally, we will have to take care to ensure that those members of society who do not, or do not as yet, have ready access to technology, such as those in isolated areas or of very limited means, are not disenfranchised by the technological revolution. Where appropriate, however, legal advice could be delivered via a tele-conference carried out over the Internet, with relevant documents scanned or photographed via a smartphone and attached to an email to the advisor. It could also be provided by a network of legal advisors working for a virtual CAB from facilities made available by law firms and other legal businesses, as part of their corporate social responsibility programmes – programmes which would further the profession’s regulatory objectives. In this way, we could increase the number of CAB advisors, while reducing the cost to the State.

45. More broadly, increased utilisation of technology should fortify a culture of reducing the costs, and increasing the efficiency, of litigation. Implementation of proposals contained in Sir Rupert Jackson’s report on civil proceedings<sup>24</sup>, and Sir David Norgrove’s report on family proceedings<sup>25</sup>, should lead to shorter, more focussed, more intensive and less expensive litigation. This will partly be brought about by increased judicial case management and by the new Jackson proposal of judicial costs management. In implementing these proposals, and in the light of the increased responsibility of the bench to ensure that cases proceed efficiently, and costs remain within proportionate bounds, we need to ensure that judges are given adequate training to become managers of litigation,

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<sup>24</sup> Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* <<http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A9356F09672EB6A/0/jacksonfinalreport140110.pdf>>.

<sup>25</sup> David Norgrove, *Family Justice Review: Final Report* <<http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf?type=Finjan-Download&slot=0000037B&id=00000B7A&location=0A644211>>.

and adequate time and to get to grips with each case. The increase in efficiency and reduction of costs for litigants on the one hand, must not result in a decrease of the quality of justice dispensed on the other.

46. The need for increased judicial control is all the greater in these economically constricted times. If cuts to legal aid and reduced incomes are not to be reflected in lower quality justice, then the legal profession and the judiciary will have to focus on how to cut down hearing times and the time taken in preparation for hearings, while maintaining the need for procedural fairness.

#### **(iv) Conclusion**

47. What should today's and tomorrow's lawyers take from all this? Where is the puck heading?

48. The answer to those questions seems to me to rest on the answer to a further question: where do we want the puck to go? Both regulatory reform and technological innovation provide us, as a society, with an opportunity to enhance our commitment to access to justice and the rule of law. They both provide the basis for increasing the possibility that citizens can gain effective and affordable access to lawyers and the justice system. Equally, they also offer the prospect that our commitment to the rule of law could unintentionally be undermined. Similarly, the reduction in financial support for the rule of law is both a threat and a challenge – and it may have hidden benefits as it pushes us out of our comfort zone and makes us contemplate possibilities which we might otherwise be too timid, too lazy, or too complacent to contemplate. We therefore have to ensure that regulation, technological innovation and financial problems are instrumental forces, which we utilise and shape for a clear purpose, consistently with our unequivocal commitment to fundamental values.

49. The manner in which the legal profession is organised in the future may well radically differ from its present structure. We may not be able to see with any real clarity the true extent of the structural reforms to come, but we can and must ensure that we guide those reforms. The way in which the game is played may be changing radically, but its purpose remains the same: securing the rule of law.



50. Thank you.

David Neuberger

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