



JUDICIARY OF  
ENGLAND AND WALES

**THE RT HON THE LORD JUDGE**

**LORD MAYOR'S DINNER FOR THE JUDICIARY**

**THE MANSION HOUSE SPEECH**

**13 JULY 2010**

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My Lord Mayor,

Ladies and Gentlemen.

I can't better my thanks for your thoughtful speech, and careful analysis of the issues of importance to the City in the context of major civil disputes, and the opening of the Rolls Building next year, than to reflect on the letter recently sent by the Headmaster of a boys Prep School to a daring military man who had given away the prizes and spoken to the boys. The letter reads:

“The boys thought it was cool.

The fathers would have followed you into battle.

The mothers would have followed you anywhere.”

And thank you, my Lord Mayor, for tonight's dinner.

More seriously. At this Banquet last year some of you will remember my contention that we faced a financial crisis, which had alarming consequences for national prosperity, and that it needed to be addressed as an imperative necessity, and that whether we liked it or not, the effect would be with us for years to come. What I knew then was that we have been as unwise as the Merchant of Venice, entering into a suicide bond on the basis that before too long his ships would come home, so that his debt would be paid off. Well they didn't, and it wasn't. We have had an election, and we now have a new government. The Chancellor of the Exchequer is no Portia: and the Lord Chancellor is no Nerissa. There is no Portia. There is no Nerissa. There would be no Legal Aid to come to Antonio's rescue: this was only after all only a civil debt.

So we in the judiciary have to face practical realities. That is what we are trained to do, day by day – not in the ivory tower beloved of our critics - but in court, where real people do unmentionable things and unmentionable things are done to and happen to them. We also recognise that in the current climate everyone can demonstrate why his or her particular resource from public funds should be left untouched – receiving the same treatment that the National Health Service receives.

Let me make it clear: when considering how best to respond to specific proposals which will save money, reduce expenditure, the judiciary will not ignore the national fiscal realities. The question will always be the same. How will this proposal impact on the administration of justice? With the emphasis not on administration for its own sake, but on the doing of justice. For this purpose, too, we must be prepared to question, I emphasise examine and question, all our processes, including some very long standing ones. I could give many examples. Let me choose a few.

Does our traditional, adversarial system continue to provide the best means for enabling judges to decide those desperately sensitive cases involving the future of children? We really must consider whether these processes are the best for this purpose.

In the Crown Court, time continues to be treated as an unlimited resource. This cannot continue. I do not understand why justice is less likely to be delivered in a criminal trial if a fair timetable is imposed, and the advocates are required to stick to the points that matter rather than fringe points. These and many other issues have been under consideration and are being addressed. The new Criminal Procedure Rules shortly coming into force will give judges express and wide powers to impose timetables: and I make it clear that I anticipate that these powers will be exercised. In the Commercial Court, where the parties pay for their costs, the imposition of timetables was greeted with horror: now it works without a murmur. What I am saying is that we can no longer afford the luxury of allowing the parties in criminal and family cases, both sides of which are largely supported from public funds, to dictate the length of the case.

Although the judiciary has absolutely no control over the Legal Aid arrangements, can we at least ask the question whether these arrangements themselves are counter-productive to an efficient trial system, and observe that, as it seems to some of us, the best rewards are not necessarily received by the most efficient practitioners?

My Lord Mayor, this could be a very long list: but that is not what we are here for. I am simply trying to focus on the realities that the many initiatives addressing areas of possible inefficiency under examination for a little time have now assumed a compelling urgency in the light of the financial crisis. In the end, the judiciary's concern for the doing of justice directly involves the speedy resolution of the dispute between parents about where the child or children should live, because if it is not speedily resolved the dispute has a corrosive effect on their relationship, and ultimately damages the children whose welfare is the paramount consideration of the process. Delayed trials mean that witnesses are called to remember incidents which happened so long ago that inevitably their memories have faded, to the disadvantage of one side or the other in an individual trial, but to the damage of justice. And how do we deal with victims of, say, sexual crimes, unless we have an efficient process, which will enable the boy or girl, man or woman, to receive the necessary treatment to help their recovery to the fullest possible extent from their ordeal?

If the end result of our national financial crisis is that all these cases take much longer to be resolved, then justice will have been damaged. And in this context, perhaps I could end by reminding us, that the demand for court services has steadily increased. The number of public law applications made in the family courts increased by 31% between 2008 and 2009, and the number of private law applications increased in the same period by 19%. 2009 saw 98,095 receipts for trial in the Crown Court. That is the highest figure since 1992. So the fiscal realities will be hitting the system of justice at just the time when the demands on it are increasing. Acknowledging these realities, the judiciary will continue its now longstanding commitment to achieving improvements in the processes.

My Lord Mayor this time last year I spent some time addressing the problem of legislative plenitude - overload. I had to be circumspect, but I hope that I did not use words which disguised my meaning. Since June we have been promised the Great Repeal Act. And I have given the problem some thought. I am sorry, My Lord Mayor, I do not want to spoil your evening, but judges have to tell things as they are.

It is with the most profound regret, that I have discovered that for just about the last 50 years, you and every single one of your predecessors has been in breach of the Calendar Act 1751. By the terms of this Act the admission and swearing in of the Mayor of London must take place on the 8<sup>th</sup> November annually. You and your last 50 or so predecessors complied with the City of London (Various Powers) 1959 section 5(1) of which provided that you should be sworn in on the second Saturday of November. What gave any of you the idea that a 1959 Act which did not amend the 1751 Act, or repeal it, could be overlooked? It's all right,

My Lord Mayor. You and I will be standing in the dock together. I was equally remiss. In my case, much more than yours, ignorance of the law is no excuse. What is worse, yours was a one off offence, whereas I am a persistent offender. I am intrigued about the new sentencing provisions which will be proposed for persistent offenders like me.

And here's another old Act. I trust that the Lord Chancellor himself, with his famed attention to sartorial matters, has had constantly in mind the Bearing of Armour Act 1313, or otherwise known as the Coming Armed to Parliament Act. I warn him against becoming involved in broils, riots and disputes, or going armed with a hackaton, or armour, or, and this will be most difficult, wearing unsuitable footwear in the House, or in court.

Which, I wonder of the 2492 – yes 2492 laws - introduced during 2009, an increase of 16% on 2008, will still be in force 700 years from now. Presumably, whether there is a nuclear explosion or not, no one will have been convicted of causing a nuclear explosion under the Nuclear Explosions (Prohibition and Inspections) Act 1998. We will presumably all hope that it will not happen. But what if it did? After such an explosion it might be a little tricky to get a judge and jury together to try any defendant who might have survived the explosion, and been found and traced by any surviving police force.

I am, I suspect, not the only member of the judiciary who is troubled by the extent of the powers granted to council officials to enter people's homes without a warrant. Or the way in which apparently sensible powers – directed to the prevention of terrorism, appear on occasions to be used to control activities which by no stretch of the imagination, have anything to do with terrorism. But my deepest concern at the moment is directed to the increased use of what are described as Henry VIII clauses. Last year I said that I hoped to be able to use the occasion of this Banquet to draw attention to matters of concern, and I propose to say something more on this topic.

Henry VIII was a dangerous tyrant. The Reformation Parliament made him Supreme Head of the Church, the representative of the Almighty on earth – hardly an encouragement to humility: it altered the succession at his will: it changed the religion backwards and forwards, at his will: they were a malleable manageable lot. And there is a public belief that the Statute of Proclamations of 1539 was the ultimate in supineness. The Act itself was repealed within less than 10 years, immediately after his death in 1547. But it had allowed the King's proclamations to have the same force as Acts of Parliament. That is a Henry VIII clause. It is perhaps worth emphasising, however, that this Act, and the supine Reformation Parliament was not persuaded to agree that proclamations alone could prejudice any

inheritance, office, liberty, goods chattels or life. It was expressly subject to those limitations.

But do we remember the Legislative and Regulatory Reform Bill of 2006 which, said to be productive of a reduction of red tape, sought to give ministers power to amend, repeal or replace any act of Parliament simply by making an Order. The proposal would have given Ministers of the Crown executive powers of a most extraordinary kind. It was eventually withdrawn when the House of Lords Constitution Committee alerted itself or was alerted to the implications of this provision. So can we sit back and relax. That's that, then. But it is not.

Consider the Banking (Special Provisions) Act 2008 enacted in the hurricane of the banking crisis. It granted the Treasury, presumably the Prime Minister and First Lord of the Treasury, the power to make:

- “(a) such supplementary, incidental or consequential provision, or
- (b) such transitory, transitional or saving provision, as they consider appropriate for the general purposes, or any particular purposes, of this Act...”

But the power goes further. It expressly provided that an order may

- “(a) disapply (to such extent as is specified) any specified statutory provision or rule of law;
- (b) provide for any specified statutory provision to apply (whether or not it would otherwise apply) with specified modification.”

So we have an Act of Parliament which expressly grants to the Treasury power to disapply any other relevant statute bearing on the provisions of the 2008 Act or indeed any rule of law.

The same process is at work with section 51 of the Constitutional Reform and Governance Act 2010. This enables any Minister of the Crown, by order to make such provision as he or she considers appropriate in relation to any provision of the Act. The Act, as it says, relates to our constitutional affairs. The order may:

- “(a) amend, repeal or revoke any existing statutory provision,
- (b) include supplementary, incidental, transitional, transitory or saving provision.”

So the new constitutional arrangements can be revisited by ministerial order, directed not merely to amendment repeal or revocation of any provisions in the Act itself, but directed at any of our existing statutory provisions.

My Lord Mayor this is a matter of great seriousness.

I have tried to pursue this question and recently read two letters from the Ministry of Justice on this topic. And it made alarming reading. First, it is clear that there is no routine method for collecting information about Henry VIII clauses. Doing the best the Ministry could, during the parliamentary session up to 10 November 2009 there were I quote “around 70 such powers contained within the legislation enacted so far”. The information is that at least 10 of them were not new, but were re-enactments, and 15 of them contained provisions allowing consequential amendments. Between 10 November and the end of the parliamentary session for 2008-09 there were some 53 additional such clauses, of which 10 were provisions allowing for consequential amendments, and 5 enabled the proper functioning of pilot schemes. So we are talking of over 120 Henry VIII clauses in one parliamentary session. Does this surprise you? It certainly astonishes me.

It is said in the letters that they are only used when there is a substantial call for them, no practical alternative for dealing with the issue in the original legislation, and that such powers are rarely wide-ranging. Well, the two Acts of Parliament to which I have referred seem to me to be very wide-ranging indeed.

You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. But why are we allowing ourselves to get into the habit of Henry VIII clauses? Why should we? By allowing them become a habit, we are already in great danger of becoming indifferent to them, and to the fact that they are being enacted on our behalf.

I do not regard the need for affirmative or negative resolutions as a sufficient protection against the increasing apparent indifference with which this legislation comes into force. To the argument that a resolution is needed, my response is, wait until the need arises, and go to Parliament and get the legislation through, if you can. I continue to find the possibility, even the remote possibility, that the Treasury may by order disapply any rule of law, or a Minister may change our constitutional arrangements, to be rather alarming. Of course I am not suggesting that any of the Ministers with whom we were dealing before June, or any of the Ministers we are dealing with now are intent on subverting the constitution. I know that. You know that. But, and it is, I suggest, a very important but: history is long as well as short, and what's to come is always unsure.

When the Great Repeal Act is under consideration, I do urge that somehow, somewhere, Henry VIII clauses and indeed, the modern clause which in reality is Henry VIII Plus clauses should be excluded from the lexicon, unless the Minister coming to the House says in express and unequivocal language that he or she is seeking the consent of the House to such a clause,

so that, quite apart from the members of Parliament themselves, the wider public may be informed of what it is proposed should be enacted on its behalf

Half a moment's thought will demonstrate that proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature. If I may adapt a phrase, if this is the way things are going, the powers of the executive have indeed increased, are indeed increasing, and I suggest that before we get anywhere near the Great Repeal Act, Henry VIII clauses should be confined to the basement of history along with the Act of Proclamations repealed in 1547. We must break what I believe to be a pernicious habit.

My Lord Mayor, on behalf of her Majesty's judges I repeat my thanks to you for your generous hospitality, and for allowing me to address issues of concern to us.

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