



SENIOR PRESIDENT
OF TRIBUNALS

Diversity and Judgecraft

**A talk by Sir Ernest Ryder, Senior President of Tribunals,
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1. In the United Kingdom the tragedy of the death of Stephen Lawrence, a death for which responsibility has never been adequately apportioned by the Justice System, is one of a series of watershed moments in any analysis of what a justice system should do to safeguard the rule of law among communities with diverse heritages, traditions and language. The underlying problem to be solved in that example was racial discrimination. The Macpherson report into the tragedy coined the term 'institutional racism' as a description of the behaviour of part of the police service.
2. Sir William Macpherson quoted the late Sir Henry Brooke in that report. Sir Henry has very sadly and only recently died. He was a former Chairman of the Law Commission in England and Wales (the independent body charged with law reform) and a judge of our Court of Appeal. He was the first judge to be responsible for equal treatment training for the judiciary in England and Wales. In a well known lecture given by him, the 1993 Kapila lecture, which was itself devoted to the theme of this conference, Sir Henry quoted the philosopher Philo from the 1st century AD: "*When a judge tries a case he must remember that he is himself on trial*". At the later Grotius Colloquium in London in March 2000 he got further into his stride and cited *The Arthashastra* which was described by him as a Hindu political treatise written over 2000 years ago: "*Judges shall discharge their duties objectively and impartially so that they may earn the trust and affection of the people*".
3. In 2006 Chief Justice Beverley McLachlin, the Chief Justice of Canada, went a little further: 'a judicial officer deciding a case in accordance with the law, in a reasonable time, and in accordance with the processes mandated by law, is only one part of the judicial task. Justice must also be delivered in a responsive manner, one that takes account of the social context, and the different perceptions of those who seek it'. That is the subject matter of this conference. As I understand Chief Justice McLachlin, she was describing a constitutional function of an independent judiciary not some extra-judicial hope that should in some way be arrogated to the office or the system. As such, the function is based in principles of law that can be justified.
4. What to judges and lawyers are the rituals, traditions and language of a formal legal process, embodying procedural protections and principles of fairness of many

centuries standing, are to some and perhaps many members of the public, who we expect to trust and respect the rule of law, incomprehensible, unfamiliar and defensive barriers. Effective access to justice is impaired by barriers of this and other kinds. Without communication and engagement between those of us who administer the justice system and the people we serve, there will not be adequate trust and understanding and, as a consequence, there will not be respect. Without respect, the rule of law becomes no more than a playground for the powerful in which access to justice is no longer effective. That is all the more so if you are a member of some of our communities who are more likely than not to have experienced a lack of understanding and respect for their rituals or practices, traditions and language or to have experienced discrimination. In addition there are many who come to the justice system, voluntarily or compulsorily, whose access to justice is compromised by disability, vulnerability or overbearing need.

5. The judiciary supports the human endeavour of re-constructing nature by domesticating, organising and patterning in an ever changing environment, using the value of fairness which brings together into practice the so-called five virtues: goodness, propriety, knowledge, ritual and sagacity.¹ If it needs to be said let us say it, values of this kind, even that of fairness are not absolutes cast in stone, they are not dependent only on historic cultural norms but develop to reflect the changing norms of society and its different communities. The effectiveness of a justice system will decline if social attitudes and perceptions diverge too far from those articulated by it and in the language used by the judiciary. Although the law depends on the wisdom of the past, it also dependent on the experience, knowledge and values of the society of today. In particular, accessibility involves inclusivity: the judiciary exercising their civic obligation as part of society and the judiciary being open to all in society. Within appropriate constitutional safeguards that prevent us straying into inappropriate policy or political arenas, judges should not only listen to social attitudes and perceptions, they should communicate and engage with communities to inform social attitudes and perceptions. Effective access to justice helps ensure that constitutional values are lived values and that people can participate in our justice systems.
6. Accordingly, I seek to suggest to you that judicial legitimacy is dependent on trust and respect which are themselves defined by the social context and perceptions of our communities. I will go further and argue that this is a constitutional duty on the judiciary in the United Kingdom, as the third limb of the State, to administer justice so that effective access is afforded and procedural fairness is guaranteed. You will each have your own formulations of that duty. That is an obligation in law that we are already delivering in different social contexts. Let me give you four examples, but before I do I shall briefly sketch out the training provided to judges by the Judicial College in England and Wales.
7. In our leadership training and in advanced judgecraft training we focus on the broad questions of social and cultural including religious diversity as issues that are relevant to the *quality* of our decision making. We approach that question by reference to social, psychological, health and linguistic contexts because these contexts have been illustrated in our case law but we also acknowledge that the contexts are not limited to statutorily protected characteristics for the purposes of discrimination law. They may be wider in jurisdictions where the understanding of rituals and practices, language and behaviours, vulnerabilities and the needs of our

¹ See, M. Puett & C. Gross-Loh, *The Path: What Chinese Philosophers Can Teach Us About the Good Life*, (Simon & Schuster, 2016) at 131.

users, is critical to the quality of the decisions we make as judges of fact and the arbiters of what is fair process.

8. In *Patrick Galo v Bombardier Aerospace UK* [2016] NICA 25 a strong Court of Appeal in Northern Ireland, presided over by the Lord Chief Justice of Northern Ireland, restated from first principles how a tribunal should approach an appellant alleging disability and race discrimination where the disability was characterised by a diagnosis of autism spectrum disorder. It is not possible to do justice to the care taken in that decision by a summary of soundbites, but let me isolate out the following:
 - a. The obligation on a tribunal to act fairly is not limited to ECHR case law
 - b. A right to be treated as an equal citizen involves support to be able to exercise rights and responsibilities and the removal of barriers to inclusion that create disadvantage and discrimination
 - c. It is a fundamental right to enjoy a fair hearing that a person is able to participate effectively in the hearing
 - d. Tribunals must focus on the reasonable adjustments that are required to do so (please note that I always use the concept of reasonable adjustments not accommodations: the latter is arguably pejorative and undermining of the concept of equality of access despite its use as a description in UN instruments)
 - e. In addition, tribunals must recognise that both procedurally and substantively a person's conduct may have been influenced by irrational matters that need to be understood, and
 - f. The obligation is on the tribunal as well as the parties.
9. In *Rackman v NHS Professionals Ltd* UKEAT/0110/15 a Presidential panel of the Employment Appeal Tribunal (that was overtly relied upon and approved in *Galo v Bombardier*) identified the same principles and gave examples of practical measures that may be required, including:
 - a. A ground rules hearing
 - b. A modified approach to procedure to facilitate obtaining reliable evidence from a disabled or disadvantaged litigant recognising that the purpose is to respect the integrity and autonomy of the individual
 - c. The need for evidence, including, where appropriate, expert evidence on the needs and issues that might be identified
 - d. A ground rules hearing that might consider, *inter alia*:
 - i. The control of questioning by the tribunal
 - ii. The approach to questioning
 - iii. Expert evidence about what is a fair procedure in the circumstances
 - iv. Assistance for the litigant and explanation in appropriate language of procedure, and
 - v. The use of different procedures including questions in writing
10. The EAT acknowledge that the tribunal's task is to be fair to all parties with the consequence that the concept of proportionality will have a role to play in the tribunal's decision making about process. The questions in an individual case would then become: does the measure further the principles of open, accessible justice, are the proposed means of implementation rationally connected with the principle, are the means no more than is necessary to achieve the principle and do the means strike a fair balance between the rights of the individual and the interests of the community? That is, for each jurisdiction in England and Wales, a procedural

question that needs to be answered so that the overriding objective in the rules of court can be complied with.

11. In *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 the Court of Appeal in England and Wales looked at the detail of how rules of court, in that case tribunal procedure rules, should be used to facilitate effective access to justice in asylum and immigration cases. It held that “*it was beyond argument that the tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the tribunal can utilise to deal with a case fairly and justly. Within the Rules themselves this flexibility and lack of formality is made clear*”. The Rules mandate an enquiry into fairness and even if they did not, there is an inherent and residual duty of fairness on all judicial bodies to take steps to eliminate unfairness.
12. Finally, in criminal procedures, the *Advocates Gateway* materials are now well embedded and supported by copious authority including practice direction. The practical effect is that a framework of good practice has been developed out of empirical research supported by the judiciary.
13. Perhaps one should have regard to the import of Article 13 of the UN Convention on the Rights of Persons with Disabilities by analogy as applying across social, cultural and religious differences, not because they are disabilities, far from it, but because all persons are entitled to the same effective access to justice and hence such reasonable adjustments as are justified to give effect to the same. That article reads:
 1. “State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodation, in order to facilitate their effective role as direct and indirect participants....”
14. Our primary source of guidance in England and Wales is the new Equal Treatment Bench Book which is issued by the Judicial College. The status of the guidance is advisory unless the advice is reflected in a decision of the Supreme Court, the Court of Appeal, the Upper Tribunal, the Employment Appeal Tribunal or a Practice Direction issued by myself or the Lord Chief Justice, that is, there is a precedent that inferior courts and tribunals must follow unless that precedent is disturbed by a superior court. The case examples I have given provide precedents that are to be followed in their jurisdictions. They are examples that can be adopted by other jurisdictions in the way that settled law derived out of principle can be applied by analogy to other factual circumstances in the common law tradition.
15. It is in that way that I want to develop the hypothesis for this conference. There are three levels to the question: the administration of justice, the application of principle to workload and the collegiate body of judges with whom you work and the application of principle to the facts of individual cases. In each case our purpose is the same: safeguarding the rule of law.
16. The procedural mechanisms by which each of us here determine how to safeguard effective access to justice will be different. That is the real business of the day – learning from each other. There will be constructs that are international, both United Nations declarations and, for example, the *acquis* of the European Union and ECHR jurisprudence and domestic, both codified and inherent. It is not my purpose in introducing this discussion to do more than identify an indicative hypothesis for debate and, I hope, a basis for further development. By way of example only, let me sketch out the three levels of principle that have been used in England and Wales to

develop a solution to the problem. The first is the identification of constitutional norms, the second principles of the rule of law including ethical principles and the third primary and secondary legislative obligations: the powers and duties set out in statute and rules of court.

17. I need do no more than identify the principles to which I am referring. They are well described elsewhere. The constitutional norms can be summarised as the obligation to secure open and effective access to justice independently of the executive and the legislature. Access to justice is an indivisible right: there is no second class and it is a key enabler in making other rights a reality.
18. In England and Wales one of our former Lords Chief Justice who went on to be the senior law Lord (what we would now call the President of the United Kingdom Supreme Court), Lord (Tom) Bingham, wrote a seminal collection entitled 'The Principles of the Rule of Law' in which he distilled national and international conventional understandings of these principles. To take two of those principles for today's purposes is sufficient: the law must be accessible and so far as possible intelligible, clear and predictable; and objective differences of treatment of those people who come to the law must be justified, that is accessibility involves an equality that individuals are not otherwise inherently able to rely upon.
19. The ethical principles to which we all subscribe are described in the UN Declaration commonly known as the Bangalore Principles of Judicial Conduct (2002). In so far as they are not in their very nature comprised within the other obligations and principles I have referred to, they are worthy of repetition: independence, impartiality, integrity, propriety, equality of treatment before the law, competence and diligence. The point that I would draw out is that, absent an imperative of law that judges must abide by, the judiciary are not just secular, that is mandated to make a decision regardless of the individual judge's belief or even the institutional belief system of the State, they are impartial, that is neutral in their approach to the religious, social and cultural views that may be espoused by the litigants before them.
20. An example of how statutory powers and duties should be used was given in *AM (Afghanistan)*. The case involves the conversion of principle into a pro-active obligation on the decision-maker himself. In addition, at the level of Head of Jurisdiction, I am required by statute to have regard to accessibility, fairness, speed and efficiency, the expertise of the judiciary in respect of the subject matter of their decisions and the development of innovative dispute resolution (by section 2 of the Tribunals, Courts and Enforcement Act 2007). That provides a framework of leadership and good practice that is all inclusive.
21. Identifying and promoting good practice, that is the behaviours and rituals that are the practical observance of professional ethics and advanced judgecraft skill, including where equality and diversity issues are engaged, by providing reasonable adjustments to process within hearings, guarding against unconscious bias and understanding heuristics is what we do. Frameworks of good practice exist within every jurisdiction in England and Wales and for the tribunals in the United Kingdom, to give effect to statutory protections, for example, in relation to children, the vulnerable and those who lack legal capacity or to promote active case management and proportionate dispute resolution.
22. In this way we try to ensure that the principles which underpin the rule of law are reflected in our individual cases and in the way in which we administer the justice system by articulating rules of fair procedure, consistency of practice by process and good practice by innovative change based on rational and empirical approaches to

problem solving. In the same way, our process and behaviours should be empathetic to those who come voluntarily or otherwise to justice.

23. To paraphrase others, unless the values I have articulated live in the hearts and minds of people, they will be of little practical utility as a defence of liberty, that is, of rights. As Justice Learned Hand said in *The Spirit of Liberty* in 1944, 'I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it.'
24. It is through effective access to courts that we test those values. And it is through effective access to our decisions that we can test them in public, democratic debate. Access to justice then is more than access to courts in order to enable claims and the rights and obligations they engage to be adjudicated. It is the means through which we uphold and articulate the law and ensure that our laws and constitution remain living instruments.
25. If we are to be understood and respected by people, we have to understand them, communicate and engage with them and take steps to ensure that fairness is a lived reality.

Thank you.

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