



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RT. HON THE LORD JUDGE

DINNER FOR HER MAJESTY'S JUDGES

MANSION HOUSE

13 JULY 2010

My Lord Mayor,
Ladies and Gentlemen.

Thank you for your thoughtful speech, for the analysis of the issues of importance to the City in the context of major civil disputes, for the plug for the City and Mayor's Court and the opening of the Rolls Building next year. Not so long ago a letter was 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. I am quoting from the letter:

"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. As an honorary Liveryman of the Plaisterer's Company you know that for a while William Shakespeare lived in Silver Street close by the Company's old Hall. I doubt whether a mere common actor, certainly not a Warwickshire country bumpkin, - William Shakespeare and I have that in common, - would have been invited to attend any celebratory dinner at the Old Plaisterers Hall. There is no doubt that as he wrote the script for Othello, which was written while he lived in Silver Street, he had in mind his experience of carousing Liverymen on their way back from a splendid evening in the hall, when he gave that intriguing and feisty character Emelia, the lines which read.

"Men are ...all but stomachs...and when they are full, they belch".

My Lord Mayor none of us will belch tonight, but your hospitality has indeed been sumptuous.

Can I remind you: when your predecessor took office, I made a request of him. Between us, I said that he and I should win the Ashes in 2009. And we did. Although I do concede that Strauss and his team made their own individual contributions. But my Lord Mayor, when you took office on the second Saturday of November - and I shall have to come back to that date - I made a very modest request. One William Shakespeare - our W S - is listed for failing to pay the tax on the 1596 subsidy rolls and the certificate dated 15 November 1597 is

still in existence and he is listed as a defaulter,. I do hope that you are not holding Emelia's remarks about the carousing Plaisterers against him.

If you are you should read what she has to say about husbands and sex.

Or maybe on reflection, you shouldn't.

It is much less polite than the kind of language used in judgments, where the Court says, "this was a very difficult case, and the judge did not receive all the help he needed".

On the other hand, there are times when we need our wives to speak up for us. This time last year the lawyers' cricket world cup took place in England. I received a letter inviting me to come and open it by opening the batting against Michael Holding. I wrote back saying that I would happily open the bowling against Michael Holding, but thought he might be a little too quick for me. But the organisers were adamant. Mike Holding wanted to bowl. What could I do? So Judith and I went up to Fenners for the great ordeal. At lunch the organisers sat me next to Mr Holding. And you who play cricket all know what it's like with really fast bowlers. You laugh uproariously at any joke they say. When he said 'hello' I was nearly hysterical. Then you try flattery. "I didn't see it but I am told the over you bowled at Geoff Boycott in the West Indies was one of the best overs ever bowled". The response: "I just bowled fast".

By now trembling, I ventured a further bit of flattery, speaking admiringly, and genuinely so, of the 14 wickets he had taken at the Oval in 1976, as I reminded him, on a batsman's wicket. The flattery did me no good. "I just bowled fast".

The verbal intimidation was too much for me, but Judith was listening in to this conversation. It still touches me now.

"Mr Holding" – notice none of this Mikey or Mike, "Mr Holding, I have been married to my husband for 44 years, and I love him very much. If you kill him, I'll kill you".

It wasn't Shakespeare, and she wasn't acting, and Michael Holding knew that she wasn't acting. So he said.

"That's all right".

Mind you, I don't think he was trembling, but when I went out to bat, with Judith's intervention to help me, thanks to her advice to me not to challenge this great man at all by wearing pads, gloves, helmet and a box - I wasn't bothered about the helmet but I was rather disappointed that she dismissed the box so peremptorily – Mike Holding bowled such a slow ball to me that I was through the shot before it got to me, and it hit me on the leg, and didn't even hurt. I am indebted to him. He was a delightful gentleman. And I say that knowing that I shall never have to face him again. Or laugh at him saying hello. But no less, I am indebted to Judith for yet another occasion when she stood by and sustained me in the face of all the odds. Aren't all we judges indebted to our other halves and those we love and who love us?

My Lord Mayor, 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. It was not a political speech, I was just facing the realities. 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 his ships didn't come home, and the debt wasn't paid off. And ours isn't paid off. 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.

And we in the judiciary have to face practical realities. That is, after all, what we are trained to do, day by day – not in the ivory tower so beloved of our critics - but to deal in reality. We also recognise that in the current climate everyone can demonstrate why his or her particular resource from public funds should be left untouched, in other words that each and every particular one should receive 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 and reduce expenditure the judiciary cannot ignore the national fiscal realities. The question will however always be the same question. How will this proposal impact on the administration of justice? With emphasis not on administration, but on the doing of justice. And for this purpose, too, we must be prepared to question, I emphasise 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 of enabling judges to decide those desperately sensitive cases involving the future of children? We really must consider whether these processes are the best in the year 2010.

In the Crown Court, time continues to be treated as an unlimited resource. This simply 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 instead of travelling over every bit of land without a stopping place. These and many other issues have been under consideration and are being addressed. We will have Criminal Procedure Rules shortly coming into force which will give judges express and wide powers to impose timetables in the Crown Court: and I make it clear that I anticipate that these powers will be exercised. It will not be comfortable. 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 and the quality of justice is not diminished. 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 and take as long as they think they want.

Although the judiciary has absolutely no control over Legal Aid and the arrangements, can we at least ask the question whether these arrangements themselves are counter-efficient to the 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. 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 give evidence about 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 help 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 the ordeal they've undergone? We need to think on these things.

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, could I remind us, that the demand for court services has steadily increased. Public law applications made in the family courts increased by 31% between 2008 and 2009, and private law applications 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. We will continue our 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 and so I am not going to repeat it. 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. It is still in force. By the terms of this Act the admission and swearing in of the Mayor of London must take place on the 8th November annually. You thought, and your last 50 or so predecessors thought, that you 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 on earth 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, I swore you in. 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 have become a persistent offender. I shall be very intrigued about the new sentencing provisions which will be proposed for persistent offenders like me.

And here's another old Act. I am sure the Lord Chancellor himself, with his famed attention to matters sartorial, 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, - I do not know what a hackaton is - 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 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 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 member of the police force. That is what I call a really useful Act of Parliament!

I am, I suspect, not the only member of the judiciary who is troubled by the extent of the powers granted to so many 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, Lord Mayor, I said that I hoped to use this occasion 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 – which is as we know hardly an encouragement to modesty and humility: that Parliament altered the succession at his will: it changed the religion backwards and forwards at his will depending on which religious book he had read most recently: they were a malleable manageable lot. And there is a public belief that the Statute of Proclamations of 1539 was the ultimate in Parliamentary supineness. The Act itself was repealed within less than 10 years, immediately on 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 that this famous Act, and this supine Reformation Parliament refused to, or was not persuaded to, agree that proclamations alone could prejudice any inheritance, office, liberty, goods, chattels or life. It was subject to those limitations.

Do you remember the Legislative and Regulatory Reform Bill of 2006 which, is going to reduce the red tape, sought to give ministers power to amend, repeal or replace any act of Parliament simply by making an Order? It was eventually withdrawn when the House of Lords Constitution Committee alerted itself or was alerted to the implications of this provision. So we can 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, this 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 listen to this. It expressly provided that an order may

“disapply (to such extent as is specified) any specified statutory provision or rule of law;

So, my Lord Mayor, 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.

You can see 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. This is the Act which deals with our constitution. 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, and the old, can be revisited by ministerial order, directed not merely to amendment repeal or revocation of any provisions in the Act, but directed at any of our existing statutory provisions which bore on our Constitutional Affairs.

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. For me, 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, and this is not a criticism, during the parliamentary session up to 10 November 2009 there were I quote “around 70 such powers contained within the legislation enacted so far”. It is pointed out that at least 10 of them were not new, but were re-enactments, and 15 of them contained provisions allowing consequential amendments. But that was not the end of the session. 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, in one parliamentary session, of over 120 Henry VIII clauses. It 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 used. Well, the two Acts of Parliament to which I have referred seem to me to be the opposite of narrow-ranging.

You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves. But why are we allowing ourselves to get into the habit of Henry VIII clauses? Why should we? By allowing them to 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 resolutions, affirmative or negative, 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 to be extraordinary, or that a Minister may change our constitutional arrangements, to be deeply problematic. Of course I am not suggesting that any of the Ministers with whom we were dealing before June, or for that matter 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, a very important but, what's to come is always unsure and history is long as well as short. We should not just be thinking about 2015, but about 2025 and 2035.

When the Great Repeal Act is under consideration, I do urge that somehow, somewhere, Henry VIII clauses and indeed, the modern clause which 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, the wider public may be informed of what it is proposed 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 to go, the powers of the executive have indeed increased, are indeed increasing, when many believe they ought to be diminished, and I suggest that before we get anywhere near the Great Repeal Act, Henry VIII clauses should be confined to the dustbin of history along with the Act of Proclamations, itself repealed in 1547. We must break what I believe to be a pernicious habit and treat the plea to necessity as William Pitt treated it, with careful disdain, and we must do it now.

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 an issue of concern to us all.

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