

2017

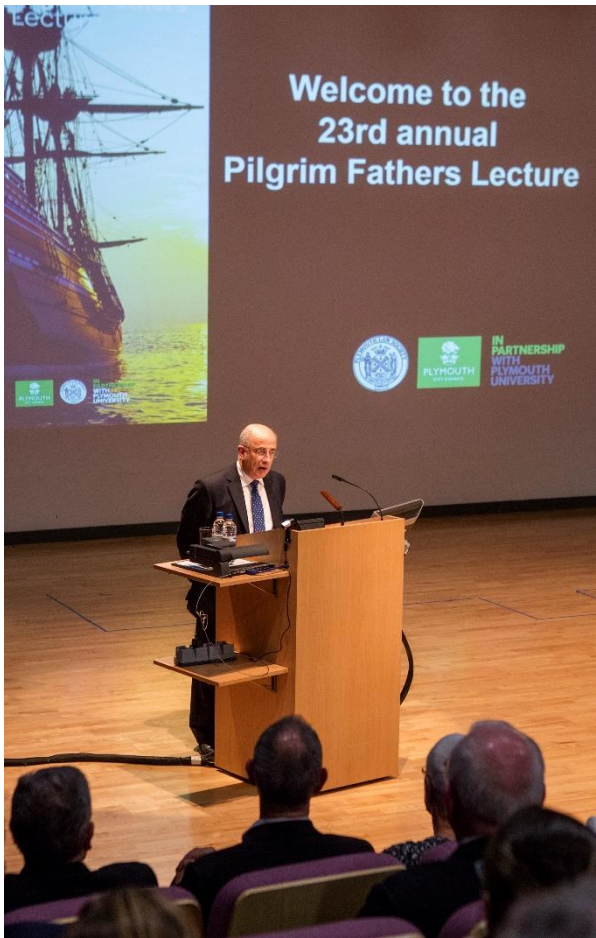
Criminal Law in the 21st Century

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Leveson, B. (2017) 'Criminal Law in the 21st Century', Plymouth Law and Criminal Justice Review, 9. Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/9048>
<http://hdl.handle.net/10026.1/9048>

The Plymouth Law & Criminal Justice Review
University of Plymouth

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**CRIMINAL JUSTICE IN THE 21ST
CENTURY**

Rt Hon Sir Brian Leveson
**President of the Queen's Bench
Division**

**23rd PLYMOUTH PILGRIM FATHERS
LECTURE
18 November 2016**

Can I start by expressing my thanks for being asked to deliver the 23rd annual Pilgrim Fathers lecture? This is an event that attracts illustrious speakers and I am honoured you have asked me to follow distinguished previous speakers. I note that last year Lord Dyson spoke about the globalisation of law and the year before that Lady Justice Hallett on the changing role of judges – delivered standing for an hour with a broken back – which shows how much of a draw for speakers your annual lecture is.

Given events over the last fortnight and the Inquiry I undertook in 2011-12, there are probably a number of headline stealing topics that you are hoping that I will address tonight. I am sorry to disappoint you but I will not be adding to the acres of coverage that is already out there on the High Court decision on Article 50 and the consequent discussion on the independent judiciary and the rule of law. It is simply not appropriate for me or any judge to comment on a decision that is proceeding through the courts. Neither will I be addressing issues around the press: from the day that I handed my report to the Government I have refused to comment further. How those issues are resolved is now in the hands of others.

You can read all I have to say on the issue in the four volume 2000 plus pages of my report. That is something you might wish to save for a rainy day, or more accurately given its length, a rainy week.

I am instead going to speak today about something you may not immediately feel is headline grabbing, but is however fundamentally important. I am going to talk about Criminal Justice in the 21st century: how – in these times of change – we are ensuring the criminal justice system is robust enough to adapt and thrive.

It is a truism that in the current climate we all have to do more with less. We have to ensure that, whilst thinking about how we adapt the criminal justice system, we ensure that the resources we have at our disposal right now are being used efficiently and intelligently. We can't afford to do things just for the sake of doing them – because they were always done that way - without questioning –we must look at how improvements can be made.

It was in this spirit of questioning and challenge that, in 2014, the Lord Chancellor and Lord Chief Justice asked me to conduct a Review into the efficiency of criminal proceedings. This was not a public inquiry or a royal commission but rather a consideration or, bearing in mind previous reviews, a reconsideration of where the criminal justice system was inefficient or failing to keep up with modern developments. It was my task to harness the goodwill of many other players operating in the silos that form part of the criminal justice systems and to look carefully at ways that we could improve efficiency. I say systems because, in reality, the police, the CPS, the defence lawyers, the courts, and probation and prisons all have their own imperatives and all see the problems they face from their perspective, each with their own resource difficulties. What I did was to ensure that all understood everyone else's problems and worked to find ways that benefitted all.

The reason I mention this Review is that my starting point was to underline that for the last 50 years at least, we have taken a system originally designed in the late 19th century and successively bolted on new protections, procedures and developments; all this has been done in the name of progress but I regret that the road to hell is paved with good intentions. The result has been that this hotchpotch of new and old is simply not an effective long term solution to the problems we face in the digital age that is the 21st century.

This is something that my fellow judges all too readily understand and, in September of this year, long after my Review had been published, the Lord Chief Justice along with the Senior President of Tribunals and the Lord Chancellor issued a joint document – *Transforming*

our Justice System. This document outlines the shared commitment to delivering a courts and tribunal system that is just, proportionate and accessible to everyone. The document reiterates that the criminal justice system is among the most powerful instruments of the state, capable of deriving individuals of their freedom. It is an essential guarantor of the rights of the law-abiding citizen. In England and Wales we are fortunate to have a criminal justice system which is admired and emulated around the world.

However to ensure that it remains this way we have to look at ways of keeping pace with change. As the justice system is adapting to new ways of working, it is critical that we approach the benefits that new technology can provide not simply to build the use of IT into our present systems but rather to develop a new system which uses what technology can offer as the starting point for a fresh approach. In order to run the criminal justice system for less, without losing efficiency or going into steady, or indeed rapid decline, this is not merely desirable but essential.

I think it sometimes surprises people that the judiciary – portrayed by some as dusty unworldly bastions of the status quo – are so receptive and enthusiastic about change and about the benefits of technology – but we are.

A short personal history lesson now for those students in the audience who have never known a life without computers, smart phones and instant 24/7 electronic access. When I started at the bar some 46 years ago, life was very different. Although copies of documents could then be printed on special paper, the photocopier as we now recognise it was still a comparatively novel, or at least expensive, ideal. Letters, proofs and statements were typed on typewriters with carbon copies or, if required in multiple copies, on roneo blanks or other special paper which could be copied onto multiple sheets.

A lack of technology meant briefs to counsel and the papers held by solicitors were consequently smaller and the documents before judges were usually slender files – a few witness statements, an interview with the accused, summarised by the police officer, and the odd letter or report. Somehow we survived; indeed, it now feels like a lost paradise – although I have heard the Senior Presiding Judge refer to such yearning for a less technological age as “unobtainable nostalgia”. Technology has changed the days of document light files.

But technology is not alone to blame. Over the years, improvements in our approach to criminal justice, designed to create a fairer, more balanced, approach to the determination of guilt or innocence, have increased our dependency on paper and dramatically lengthened

how much time trials take. These improvements have transformed our processes. Thus, in place of summarised interviews recorded by a police officer in his notebook hours after the event, the Police and Criminal Evidence Act 1984 gave us tape recorded interviews all of which are transcribed. Problems about the extent to which the police disclosed material helpful to the defence led to the Criminal Procedure and Investigations Act 1996 and prescribed a system for much wider disclosure of what is described as unused material. The Youth Justice and Criminal Evidence Act 1999 introduced special measures and video recorded examination in chief which must then be transcribed; pre-recorded cross examination of vulnerable witnesses has been piloted and also used to avoid the trauma that many victims experience attending court. The Criminal Justice Act 2003 has admitted evidence of bad character and hearsay. All require consideration with submissions and rulings of law in areas not always as straightforward as we would like.

Going back to technology, modern developments have affected us in other ways. Cell site analysis of mobile phones has proved invaluable but produces schedules of enormous length. The quantity of electronic material which emanates from text messages, e mails, Facebook and a myriad of other sources is unimaginably huge. All this has had to be transcribed or printed and the amount of paper we now have to wrestle with is almost unmanageable. By way of example, a rape trial is no longer the evidence of the victim, a doctor, a police officer and the defendant: it requires analysis of smart phones, messaging and Facebook, to say nothing of other records, with further schedules of material.

Judges are, of course, very used to handling paper and, indeed, many probably prefer to see the written word on paper (which does not have that irritating habit of disappearing at the click of a computer mouse) to reach across and compare it with another piece of paper, to mark it up; this is what they have done for all their professional lives. We may have embraced some elements of what the new technologies have to offer, but because of a lack of sufficient investment we have for too long remained rooted in many of the working practices that would be wholly recognisable to judges and court staff from 4 decades ago; perhaps, albeit with parchment and quill, 300 years ago.

Even though we are in 2016 and much has changed, by grafting modern techniques onto our 19th or 20th century system, a great deal has stubbornly remained the same. Endlessly re-keying in the same information; repeatedly printing and photocopying the same documents; moving files about, losing all or parts of them in the process as new material is not linked to the correct file; finding ourselves unable to move judges and courts because we need to transfer the documents which are all in wrong place. We watch many of our staff transferring

bundles from courtrooms to chambers, from chambers to back offices, from back offices to archive warehouses. It is a heavy handed, duplicative, inefficient and costly way of doing our work and it is all about to go.

So what are we doing? We simply cannot go on with outmoded ways of working and, in crime, these ways are starting to disappear. Considerably past time, we will finally catch up with the world in which we renew our driving licences, bank, shop and book holidays on line, or download novels to read on a tablet and music to listen to. To that end, we have secured a package of investment in the administration of HM Courts and Tribunals Service amounting to over £700m. On the back of this investment, the judiciary and HMCTS are in the process of planning, coordinating and delivering reform.

What does the reform look like? Cases will all be managed on line. Information will only be keyed in once, whether by a police officer in a criminal case or by a legal executive or a litigant in person in other jurisdictions. It will then be passed down the line in digital format, being bundled and stored electronically. In crime (and this will be replicated for civil, family and tribunals), the Common Platform is being developed to ensure a digital end to end process. The police will be able to upload statements and exhibits to the CPS electronically. Information in a case will only need to be typed in once. The CPS lawyers will be able to review charging decisions on-line and request further information electronically. This ability to review on-line will be piloted in my home town of Liverpool from the 16 January next year.

The material which forms the basis for a prosecution will be able to be served on the defence and on the court electronically. Appropriate documents will be shared with the court staff, the probation service and the prison authorities, again electronically. No more couriers. No more lost pieces of paper. No more delays because there is no one to print, photocopy or deliver, or because the ageing equipment is on the blink yet again.

IT reform cannot, however, work in isolation to effect reform. There must also be culture change amongst the judiciary and parties when managing cases through court. One of the reforms leading the way on culture change is Better Case Management ("BCM"). This programme is led by the judiciary, it is aimed at improving the way criminal cases are processed through the system by robust case management, a reduced number of hearings, and maximum participation and engagement from all parties.

BCM was implemented nationally on 5 January 2016. The statistics are not yet sufficiently robust to provide in-depth analysis. However some emerging themes are:

- A significant decrease in the number of hearings required to dispose of a guilty plea in the Crown Court. In September 73% of guilty pleas where the cases were concluded, and which were subject to BCM, had on average 1.22 less hearings per case;
- An increase in the number of cases sent from the magistrates' court for sentence rather than sent for trial, showing that guilty pleas are being entered at the earliest opportunity. When these sentence cases are added to the EGPs it shows that between June – August the EGP rate was 47% of the proportion of all verdicts.
- A significant increase in the number of Early Guilty Pleas sentenced on the day. In July 2015 around 10% of cases were sentenced on the day but this has risen to just under 25% in August 2016.
- There has been an increase in the proportion of cases where a plea is taken at the first hearing. Prior to the implementation of BCM pleas at the first hearing were below 40%. Since the introduction of BCM the proportion has increased to recent levels of 70%.

BCM is designed to operate digitally. BCM and the Crown Court Digital Case System complement each other. The introduction of that system has overall been very positive. It has resulted in the following benefits:

- A reduction in the handling of documents;
- The standardisation of the file format ensuring easier access; service and safe storage of documents;
- More efficient processes for certain administration tasks;
- Better preparation for the Plea and Trial Preparation Hearing through an online PTPH form.

There are now over 17,000 users of the Digital Case System. I don't know how many of you are familiar with a building in London called the Shard? The Shard is a 95 story skyscraper – the tallest building in the UK. Someone (probably with too much time on their hands) did the calculation that if the papers saved by the use of the Digital Case System were piled on top of each other - it would be equivalent to saving 2.7 heights of the Shard per month.

As a result, disposals are outstripping receipts. Therefore, the backlog is reducing as the outstanding caseload reduces as the older cases in the system are being disposed of. From April – August 2016 the overall outstanding workload is down by 20%. I recognise that receipts are also reducing but these are, on any showing, impressive figures.

It might be appropriate to relate to you at this point an illustration of the practical effect of better case management and working digitally. Last week, the Chief Justice of New Zealand, Sian Elias, was giving a speech in Cardiff and said that she had never been around a Crown Court in England or Wales. She was taken to Cardiff Crown Court by our Lord Chief Justice, Lord Thomas, and they visited the listing office. Traditionally you would have expected to see a room swamped by paper. However, the office was almost paper free – just six files sat in a corner: these were appeals from magistrates. The Chief Justice of New Zealand went away astounded that we had managed the feat of making the paper disappear.

On a personal note one of the things that makes a difference to my day to day life is the fact that the judiciary has been provided with an upgraded and up to date system which has allowed it to be more flexible so that judges can access the case papers from different places at the press of a button or just by lifting the lid of their laptop, I can see some of you thinking – what's the big deal? Well this is instead of having to navigate complex processes to get our equipment to respond, using security tokens or dongles and multiple passwords, while the PC slowly fires up each and every time it is removed from its docking station. As you have probably picked up from that description this was a constant source of frustration to me. The new IT equipment has allowed me to work electronically with much more ease – much to the relief to those within earshot of my office. Thanks to the new system “ejudiciary” I can send and receive emails, get the papers in the case and have access to all the present judicial sites from any computer or smartphone from anywhere as long as it has basic encryption.

WiFi has been installed in criminal courts, with civil, family and tribunals soon to follow. Courts have large, high resolution screens and documents and other electronic material will be presented directly from the advocates' laptops, avoiding the broken or incompatible DVD and CD players; the software exists to make this happen and there is no reason why we should not use it.

There are times in the more difficult and sensitive cases, the traditional model of face to face meetings in court will still take place – jury trial is not about to move to virtual reality – but much of the preliminary work will be done by everyone in their offices, retiring rooms or some remote video suite with all the participants being linked together by WiFi or 3G, 4G or 5G (wherever the numbers next end up). These changes work for those in custody as well. Many are housed hours away from the trial centre where they are due to appear and, other than for the trial itself, do not wish to spend that time in the locked small compartment of a prison van only to find out that when they return in the evening, the cell in which they were

kept has been re-allocated. Mentions and pre-trial hearings can be conducted over a video link or other internet based communication system. Even more, solicitors do not want to spend hours visiting prisoners in custody if they can conduct interviews over the internet. That is not to say that face to face meetings are not critically important – but they are not necessary for every time a solicitor wishes to speak to his client or vice versa.

Over the next couple of years, justice will start to look and feel very different and it is vital that it does. For me and perhaps for many of my colleagues, it will be a real challenge but not for the next generation. Many of the students in the audience will have lived out much of their lives on these devices. You expect to get information off a computer, tablet or smart-phone and to communicate with people on line. I hope you do not entirely lose the facility to deal with real human beings, but I admire the fact that to you it is second nature to communicate virtually.

I have talked to this point about the practical IT changes that will allow us to conduct business in a way more befitting the 21st century. But some of this change does raise further questions which I have already mentioned. Although trials will still require everyone to come together, it is important to ask whether we will lose some indefinably important human element and the possibility of persuading the parties to accept compromise or reality by moving away from face to face meetings in court? There is great attachment to the visceral, biological nature of human interaction. I think the answer is that we will have to learn new techniques of interaction but I have no doubt that we shall.

And what about all those litigants in person or those without a good command of English who may struggle to navigate the new on-line systems? How can they meaningfully participate in a sophisticated on line justice system? Litigants in person are not infrequently seen carrying around a large pile of dog-eared papers, that are festooned with post-it notes and indecipherable scribbles. Will we really be able to assist them in going digital? The answer will have to be an excellent front of house service offered by HMCTS; while recognising the funding problems, we must also encourage other organisations such as Citizen Advice Bureaux, Personal Service Units and others.

The Review also made other changes to ensure that the limited resources available for the system are best used to the benefit of all those involved. An emphasis on the police and CPS getting things right first time – with the additional resources necessary for that purpose. Each case to have identified case owners who can communicate with each other and seek to resolve issues. Far more pro-active intervention by the court to identify the real

issues in the case and ensure that problems are solved early and not left to drift. Greater control of expert evidence with experts on each side meeting to ensure that they identify what the true disagreements are. A more streamlined approach to the trial with greater assistance for juries and directions of law provided at an appropriate time which is not necessarily at the very end. All these proposals were identified in the Review, all were accepted by the government and all are being implemented.

I recognise that elephant traps abound, both in relation to the technological developments but also the procedural changes but if this works effectively and efficiently – and, so far, it is – we will have created a brand new justice system that will meet and it may even exceed the expectations of the public and the litigants. It is also likely to save the government very substantial amounts of money without the salami slicing and degradation of the system to which I have referred. This is a once-in-a-generation opportunity that will ultimately affect all of us.

Thank you very much.