"Horizon scanning for human rights: Accounting for Accountability."

Address by the Rt Hon Lord Justice Green, Chairman, Law Commission of England & Wales

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A. Accountability

1. My subject matter is "*accountability*". When I first selected this topic, I had no inkling that, in short order, it would become the hottest topic in town as Parliament and the Executive slogged it out in Whitehall and the Palace of Westminster and in the courts and would embroil the Crown and the Privy Council in disputes[2] about the power to hold the Executive to account[3].

2. Whilst I will touch upon some of the issues arising in this litigation my focus is different. I wish to consider accountability as a forensic optic through which we should view human rights and the function of the courts as guardians of such rights[4].

3. My focus is therefore on accountability as between individuals and the state, and not between organs of the state *inter se*. And, more specifically, my focus is on how the courts will ensure accountability in the future in a world increasingly dominated by technology.

B. Accountability and the Courts

4. The courts are the main mechanism for ensuring accountability. The figures speak for themselves. The statistics bear out the centrality of the role of the courts to maintaining peace and order in society. Consider how society would behave if the courts did not exist to resolve their disputes? The numbers are telling. There are about 3.7m cases decided by the courts and tribunals each year which is over 300,000 cases per month or 75,000 each week or 10,000 each day[5]. Justice is largely performed close to the ground, by judges at the level of magistrates, district judges and equivalent tribunal judges.

5. Accountability is interwoven throughout the rule of law but, like the "*rule of law*", it is illusive to define. Historically, constitutional lawyers turned to A.V. Dicey in 1885 for

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[1] This paper is an extended version of a much shorter oral address given at the conference on 16th October 2019.

[2] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)*; *Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41 on appeals from: [2019] EWHC 2381 (QB) and [2019] CSIH 49 ("*Miller & Cherry*")

[3] Cf ibid paragraphs [46] - [47].

[4] I emphasise from the outset that whilst I have picked out a variety of potentially contentious issues I am not, expressly or implicitly, intending to express any views about their merits. My purpose is to identify and highlight, not resolve. As judges say to juries when summing up the evidence: "If you think that I have expressed a view on the merits it is unintentional, and you should ignore it". All views expressed are in any event entirely personal.

[5] There are about 1.5m criminal cases of which about 90% are in the Magistrates court, with the remainder arising in the Crown Court. In 2017, County Courts received 2 million claims, of which 86% (1.75 million) were claims for money. Only 15% were defended. A high and increasing percentage of these are dealt with through the digital on-line system. Most cases are settled in the absence of both parties and without the need for a trial. There are 260,000 family case. Appeals are a tiny fraction of the workload. For instance, the Court of Appeal deals with about 10,000 each year and the Supreme Court about 200.

the classic articulation of the rule of law[6]; but later commentators criticised this as "*thin*" and lacking sufficient substance and formulated a "*thicker*" version. This version is illustrated by a statement of the Secretary-General of the UN in a 2004 report entitled "*The rule of law and transitional justice in conflict and post-conflict societies*"[7], and positions accountability at its heart:

> ""[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

6. The statistics on court usage referred to cover all types of case. Many involve (horizontal) civil cases between private (natural and legal) persons where the courts hold the parties to account as between each other but also to the law of the land, be it statutory or common law. But a large number involve (vertical) disputes between the state and individuals. This includes virtually all criminal case which cover about 1.5m cases. It includes hundreds of thousands of tribunal cases for instance concerning the right to a social benefit or payment, or the right to immigration status or asylum. It also covers family law cases where courts determine what is in the best interests of a child which might engage a dispute between parents and a local authority. And of course, it involves judicial reviews where individuals challenge policy decisions taken by Government in judicial reviews, though these are a miniscule portion of the total and cases involving what has been described as "*high policy*", of the Brexit type, are even more rare - under one in a million.

C. Accessibility, potency, confidence and effectiveness

7. For courts to ensure accountability there are four essential pre-conditions. First, the courts must be "*accessible*". Second, the courts must be "*potent*". Third there must be "*public confidence*" in the role played by courts. And fourth, each of accessibly, potency and confidence must be "*effective*". These conditions are umbrellas for many other different principles. Let me give some examples.

Accessibility

8. First accessibility. For courts to be *accessible* litigants must have a broad *locus* or entitlement to go to court to seek to establish a right and secure a remedy. To be

[6] A. V. Dicey, Introduction to the Study of the Law of the Constitution, London, Macmillan, 1885. The rule of law centres upon three fundamental principles: (i) "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power"; (ii) "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"; and (iii) "the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts".

[7] UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies, Report to the Security Council* (23 August 2004) UN Doc. S/2004/616, paragraph [6] page [4].

accessible there must be no significant financial impediments, such as court fees. In *UNISON v Lord Chancellor*[8] ("*UNISON*") in 2017, the Supreme Court condemned tribunal fees imposed by the Lord Chancellor which had the effect of substantially curbing access to justice. In this era of escalating digital justice, technology must be a friend not a foe to access to justice. The Supreme Court in *Kiarie and Byndloss, R (on the applications of) v SSHD*[9] ("*Kiarie*") condemned rules which permitted only out of country appeals in certain immigration cases upon the basis that, taking account of technological limitations, the quality of access would be substantially undermined (ineffective) and risked harming human rights.

Potency

9. Second potency. To be *potent* courts must have a full armoury of remedies and must be prepared to create new remedies if necessary to protect a right. In the recent Supreme Court judgment on prorogation (*Miller & Cherry)* the court emphasised that it was the duty of the courts to resolve difficult cases and, if necessary, create appropriate remedies. Courts lack potency if the reasons behind decisions are hidden from view. There must therefore be obligations upon decision makers to explain their reasons and, in turn, decision makers must be obliged to disclose the documentary and other evidence which underpins decisions, however awkward or embarrassing. Government has a duty of candour and must come to court with its cards "*face up*" on the table[10].

10. Courts also lack potency if there are "*no go*" areas where the courts cannot act. This is an area of controversy in the US where the Supreme Court has recently ruled that courts have no jurisdiction to supervise state legislatures on subjects which engage fundamental rights and which impact adversely and directly upon the Constitution. If the courts are excluded from such decisions accountability is eroded. This has become controversial here arising out of the Brexit cases culminating in the judgment of the Supreme Court that issues relating to accountability of the Executive to Parliament and of both to the courts were justiciable. Issues of justiciability have arisen also in relation to ouster provisions in statutes[11].

Confidence

11. Third, confidence. Neither the Executive nor Parliament play a significant role in holding judges to account. But for the public to accept judgments and decisions of courts a key psychological element must exist, *confidence*. The rule of law depends upon acceptance by society that the law binds, like it or not, and that it is judges that enforce the law. So, in the absence of a formal body holding the courts to account the courts themselves assume the responsibility for ensuring that the public are confident in what they do. To ensure "*confidence*" judges must be independent and impartial. Litigants must know that when judges take decisions we do so upon the basis of the law and not personal or political predilection.

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[8] [2017] UKSC 51.

[9] *Kiarie and Byndloss, R (on the applications of) v SSHD* [2017] UKSC 42.

[10] *R v Lancashire CC Ex p. Huddleston* [1986] 2 All E.R. 941. See also *The Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Limited* [2002] EWCA Civ 1409 at paragraph [50]; and *R v Secretary of State for Trade and Industry Ex p. Lonhro PLC* [1989] 1 WLR 525.

[11] See e.g. *R (on application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 ("*Privacy International*").

12. If the public are to be confident in our work, then we must also be accountable. Judges make this clear through the oath they swear upon appointment, which is made to the Crown, as the embodiment of society, but separate from the Executive and Parliament, to do right by all manner of people and without fear or favour. But our obligations to the people go beyond mere oaths. Under section 6 HRA 1998 the Courts are public bodies subject to the principles of the Act and the Convention[12]. So, if a judge fails to observe fundamental norms, then that failure is[13], *quite independently*, actionable as an alleged violation of the HRA and the Convention, and another court (such as the Strasbourg Court or another domestic court) is obliged to accord suitable remedies, just as if the breach had been committed by a non-judicial body. This has been well established in the case law under the Convention where courts, which have failed to conduct, for instance, proper criminal trials of violent defendants, have been found to be liable for breach of Article 3 in subsequent civil claims brought by the victims of the crimes in question.[14] The Strasbourg Court has explained this as a necessary component of accountability.

13. Confidence is connected to visibility. Courts must be as open and transparent as they can be. This impacts upon the freedom of the press but the news these days is increasingly disseminated and made by commentators outside of the press and we must accommodate these developments. The courts should, to the greatest degree possible, make available relevant court documents so that the public can see what it is that a case is about and can have confidence in the impartiality and independence of the judges.

14. In *Kennedy v Charity Commissioners*[15] the Supreme Court extolled the importance of openness to accountability:

> "Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise, the press, NGOs and individuals concerned to report on issues of public interest."

15. The importance of transparency in the operation of the courts to accountability was also underscored in *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [16] ("*Cape*") where the Supreme Court explained that whilst it was the courts that were the power house of accountability, in a democracy it was the consent of the people that legitimised that power, so that open justice meant that the courts were policed by public scrutiny and this implied and necessitated the fullest possible transparency. The nexus between the "*consent*" of the people and the legitimacy of the courts as arbiters, is a description of a relationship of confidence.

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[12] Section 6 Human Rights Act 1998 imposes a duty on public bodies to adhere to the Act and this includes courts and tribunals so that not only must these courts and tribunals apply the principles in relation to allegations of failures by other public bodies and individuals but the courts must also find breach and liability if, through their own, conduct, they breach the Act.

[13] Assuming not cured by an appeal.

[14] See e.g. *Ali & Ayse Duran v Turkey* [2008] ECHR 289 at paragraphs [61] and [62].

[15] [2014] UKSC 20 at paragraph [1].

[16] [2019] UKSC 38.

16. The concepts or conditions of accessibility and potency are closely allied to confidence. This point was powerfully made by Lord Reed in the Supreme Court judgment in *UNISON*[17] in 2017 and was relied upon in that case as a reason for condemning impediments to access to a court or tribunal, which risked undermining confidence in the supervisory capabilities of judges. Access to a court (or tribunal) was a central substantive right which was linked to effective accountability[18]. Without such access, said the Court: "*...laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade*.". The *knowledge* that a court is open to all and is potent and can and will exercise (potent) coercive power incentivises *ex ante* compliance. Confidence that the courts will so act is linked to the ability of the court to exercise coercive power and this is connected to access to the court.

17. Whichever way one looks at it, accountability is a big principle and explains the existence of a host of <u>other</u> principles which are independently recognised as integral to the rule of law. All of this however is preface to my next task which is to identify substantive issues hoving into sight upon and even beyond the horizon which reflect the types of issues that the courts are going to have to grapple with in coming years which affect accountability.

D. Digital decision making

18. I want to start with digital decision making. Algorithmic decision making is on the increase across Government affecting decisions spanning social security through to immigration. In the arena of criminal justice, the police collect a vast amount of digital data and increasingly use machine learning AI algorithms for such matters as facial recognition and video analysis, mobile phone extraction, social media intelligence analysis, predictive crime mapping and individual risk assessments[19]. There are benefits to be gained from the use of AI but there are also risks in particular arising through reliance in skewed or biased data. Researchers have identified a variety of causes of potentially unreflective data sets.

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[17] [2017] UKSC 51.

[18] Ibid paragraph [68]. The Court (*inter alia*) cited Blackstone citing Coke in his *Commentaries on the Laws of England* (1765-1769), who stated: "A … right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." (Book I, Chapter 1, "Absolute Rights of Individuals").

[19] See eg Babuta and Oswald, RUSI, "*Data Analytics and Algorithmic Bias in Policing*" (September 2019). At pages 7 and 8 the authors observe: "A small number of police forces have developed machine learning algorithms to assess reoffending risk for known offenders in the force area, to inform prioritisation of operational activity and to assist decision-making at the entry point to the criminal justice system. For instance, Durham Constabulary's Harm Assessment Risk Tool uses random forest forecasting (a form of supervised machine learning) to classify individuals in terms of their likelihood of committing a violent or nonviolent offence over the next two years. The purpose is to assist officers in assessing offenders' eligibility to participate in the Checkpoint Programme, a voluntary out-of-court disposal scheme designed to reduce reoffending by addressing the underlying factors causing individuals to engage in crime. Avon and Somerset Constabulary uses similar technology to assess factors such as likelihood of reoffending, likelihood of victimisation/vulnerability, and likelihood of committing a range of specific offences. Through an app on their mobile devices, neighbourhood officers can instantly access the risk profiles for each offender registered in the force area, which are recalculated on a daily basis. West Midlands Police are developing a similar offender assessment system as part of their Data Driven Insights project, while Hampshire Constabulary is developing a machine learning predictive tool to assess risk of domestic violence offending."

19. In the context of cuts to police funding since 2010, the Government made "digital transformation" funds available which incentivised the police to increase their use of technology in order to qualify for central funding. Research suggests that this created incentives to use digital policing and investigation solutions even where the technology on offer was sub-optimal.[20]

20. Algorithms trained on police data risk replicating existing biases inherent in a dataset. In one interview conducted by researchers a senior officer gave the following example: "*…young black men are more likely to be stop and searched than young white men, and that's purely down to human bias. That human bias is then introduced into the datasets, and bias is then generated in the outcomes of the application of those datasets*"[21]

21. Data sets do not always reflect behavioural and demographic change. In terms of <u>incidence</u> men commit crime at significantly higher rates than women. In terms of <u>type</u> of offence men are more likely to commit violent crimes than woman. In terms of <u>age</u> offending peaks in teenage years and decays over time. Data sets which overly aggregate different types of offender and which thereby fail adequately to reflect such trends can lead to skewed decision making.

22. Risks also arise from the fact that many AI systems are off the shelf and procured by users from third parties.[22] This creates problems if the technology is proprietary and the user does not have access to the training data, which requires beta testing with <u>new</u> data to assess bias. There may be insufficient control over the source of the inputs, which may have been developed for different purposes, or in a different legal environment, or according to different standards.

23. How does this affect accountability?

24. AI is increasing used in relation to decisions supervised by the courts, tribunals and other quasi-judicial bodies, such as bail, sentencing and parole. But what if the data sets which underpin the algorithms are flawed or skewed and what if, because of iterative machine learning, those flaws are amplified through subsequent repeat usage so that even that which was initially *de minimis* becomes significant? And what if this leads to a person being wrongly charged or wrongly remanded in custody and not bailed[23], or wrongly sentenced or wrongly detained for too long because parole was wrongly refused?

25. Such decisions engage fundamental and human rights including fair trial rights, rights relating to unlawful detention or deprivation of liberty, rights not to be discriminated against, and private and public law rights relating to the use by public authorities of data belonging to the subject.

26. For the courts to ensure accountability and to perform proper supervision will require adaptation. How are we to grapple with arguments and submissions that decisions based

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[20] Ibid page 11.
[21] Ibid page 12.
[22] Michael Rovatsos, Brent Mittelstadt and Ansgar Koene, 'Landscape Summary: Bias in Algorithmic Decision-Making', CDEI, 2019. See also Babuta and Oswald (ibid) page 14ff.
[23] An example given in Lina Dencik et al "Data scores as Governance: Investigating Uses of Citizen Scoring in public services" Cardiff University 2018; see also Babuta and Oswald (ibid) page 14.

upon AI are unfair and unlawful? Will decision makers need to disclose the underlying algorithms to scrutiny? If so, techniques will have to be devised to enable the court to perform such an evaluation. Few, if any, judges have the skills to perform this. An alternative form of verification might need to emerge. This could possibly be through specialist independent bodies. Might they be funded centrally as a form of type approval agency? Might a rule emerge that no public body is permitted to take decisions based upon AI unless the algorithm is type approved according to an objective standard testing for bias? In the context of the use of AI in policing some commentators have called for the use of nationwide codes of conduct governing use and the establishment of standard processes for model design, development, trialling and deployment, coupled to ongoing monitoring and evaluation[24]. Others have suggested that before AI becomes widely deployed that there should be systematic investigation of claimed benefits and drawbacks.[25]

27. A judgment of the Supreme Court of Wisconsin in *State of Wisconsin v. Eric L. Loomis*[26] in 2016 highlights some of the issues. There, on an appeal following sentence, the appellant challenged the use of an AI based risk assessment for sentencing called "COMPAS" which is a proprietary system used by the authorities in a wide range of predictive contexts in the criminal justice system.

28. It was common ground in the case that there existed a body of reliable evidence that the COMPAS system could include a variety of different types of bias. In judgment the Court acknowledged the existence of literature which warned against the "*overselling*" of the results of risk-based assessments. That literature suggested that supporters of models such as COMPAS were reluctant to acknowledge the paucity of reliable evidence which underlay many AI systems. One commentator had stated: "*Unless criminal justice system actors are made fully aware of the limits of the tools they are being asked to implement, they are likely to misuse them*"[27].

29. The Court recorded that the State accepted that there was equivocal evidence as to the accuracy of predictive risk assessment tools and in argument the State had frankly acknowledged that "*no method of risk assessment is without error*". The State had cited a text on COMPAS which summarised multiple studies that had assessed predictive validity as only "*moderate*".

30. There was also equivocal evidence as to whether risk assessment tools disproportionately and artificially classified minority offenders as higher risk, often due to factors outside their control, such as familial background and education. Some studies indicated that COMPAS was more accurate in predicting recidivism among white offenders than black offenders[28]. And there was also an acknowledged concern that the data sets used for the predictive analysis were static and were not updated to

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[24] Babuta and Oswald (ibid) page 17.
[25] Ibid page 18; see also Albert Meijer and Martijn Wessels, "*Predictive Policing: Review of Benefits and Drawbacks",* International Journal of Public Administration Volume. 42, No. 12, (2019) pages 1–9.
[26] (2016) WI 68.
[27] Cecelia Klingele, The Promises and Perils of Evidence-Based Corrections, 91 Notre Dame L. Rev. 537, 576 (2015).
[28] A recent analysis of COMPAS's recidivism scores based upon data from 10,000 criminal defendants in Broward County, Florida, concluded that black defendants "*were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism.*" Likewise, white defendants were more likely than black defendants to be incorrectly flagged as low risk.

retain currency. It was recognised that to remain relevant and accurate, risk assessment tools "*must be constantly re-normed for changing populations and subpopulations*."[29]

31. The Court did not reject these criticisms and did not find that the COMPAS system was in all respects perfect. It accepted that it might contain gender bias. It accepted that it could incorporate generic information which might not reflect the appellant. The Court also accepted that it was well-established that *"[a] defendant has a constitutionally protected due process right to be sentenced upon accurate information.*"; the right to be sentenced based upon accurate information included the right to review and verify pre-sentence information upon which the court based its sentencing decision[30].

32. It was in this ostensibly promising context that the appellant argued that due process, fair trial, rights were violated because (and I sumamrise): (1) the proprietary nature of COMPAS prevented the appellant from assessing its accuracy thereby denying him the right to ensure that he was sentenced upon an accurate basis; (2) the use of COMPAS denied him the right to be sentenced upon the basis of information specific to his own case, as opposed to generalised (generic) information; and (3), the use of COMPAS improperly used gendered assessments in sentencing which risked distorting decision making.

33. The Court rejected these arguments. It held as follows.

34. Risk assessment was only part of the overall assessment made by a Court in sentencing. Provided decision makers were aware of the risk and the limitations of the COMPAS tool then that obviated the risk that results generated by use of the tool could be accorded excessive weight[31]. Next, although the appellant could not review how the COMPAS algorithm calculated risk he could nonetheless challenge the resulting risk scores set forth in the report attached to the pre-sentence information and he could make submissions accordingly. This was so even though the risk scores did not explain how the program used information to calculate the risk scores[32]. Further, in any event, the burden of proof lay with the appellant to establish actual bias, which he had failed to do. This case highlights serious questions about the use of algorithms in justice systems.

35. First, in relation to issues of alleged gender bias the court recorded that: "*Due to the proprietary nature of COMPAS, the parties dispute the specific method by which COMPAS considers gender. [The appellant] asserts that it is unknown exactly how COMPAS uses gender but contends that COMPAS considers gender as a criminogenic factor. The State disagrees, contending that the DOC uses the same COMPAS risk assessment on both men and women, but then compares each offender to a "norming"*

[29] Klingele, (supra) at page 576.

[30] Eg *State v. Skaff*, 152 Wis. 2d 48, 53, 447 N.W.2d 84 (Ct. App. 1989); *Gardner v. Florida*, 430 U.S. 349, 351 (1977).

[31] "35 *Although we ultimately conclude that a COMPAS risk assessment can be used at sentencing, we do so by circumscribing its use. Importantly, we address how it can be used and what limitations and cautions a circuit court must observe in order to avoid potential due process violations*."

[32] The Court explained that the risk scores were based largely on static information (criminal history), with limited use of some dynamic variables (i.e. criminal associates, substance abuse) and that as for the static matters these were all information that the defendant had access to and he had the ability to challenge the information or seek to supplement it. The Court also rejected the argument that the frisk assessment could not have been used during the trial; the Court stated: "*Given that the rules of evidence do not apply at sentencing, we need not address that argument here*".

group of his or her own gender." The Court did not resolve the dispute, because it was unprepared to lift the proprietary veil, notwithstanding the acknowledged limitations over the accuracy of the tool. There is at least a serious argument that the public interest should prevail over a private (proprietary) interest.

36. Second, the Court noted that the tool was designed to assess group data. It was analogous to an actuarial risk assessment in the insurance market, which identified risk among groups of drivers and allocated resources accordingly. As such it was about "*predicting group behaviour . . . it* [was] *not about prediction at the individual level*." It followed that an individual who had never committed a violent offence could still be labelled as a relatively high risk of recidivism on the violent risk scale. The Court noted an example: "*…an offender who is young, unemployed, has an early age-at first-arrest and a history of supervision failure, will score medium or high on the Violence Risk Scale even though the offender never had a violent offense*." The Court nonetheless held that consideration of a COMPAS risk assessment in a sentencing exercise was still "*helpful*" in providing the sentencing court with as much information as possible to arrive at an individualized sentence <u>provided</u> only that courts were aware of its limitations. But if the predictive tool is skewed in ways that a court is oblivious of then how does the judge know what weight should be attached to the advice being given about risk? Without knowing with confidence that a predictive tool is accurate and not gender or race biased, how does a general warning to a judge or decision maker to exercise caution assist? If the tool is biased or predicated upon skewed data, then according it <u>any</u> weight might be dangerous; but conversely if it <u>is</u> reliable then a caution about giving it undue weight might underplay its probative value.

37. Third, the Court held that the appellant had failed to meet his burden of proving that the sentencing court actually relied upon gender as a factor in sentencing and for this reason the use of the tool did not violate the appellant's due process rights. But how can an appellant meet this burden of proof given the refusal to disclose the underlying data even though on the evidence there was some cause for concluding that there might be some gendered bias built into the system? The reasoning of the court appears circular.

<u>E. Digital justice</u>

38. Technology is not only being used to influence substantive decisions, it is also being used in hearing and trial procedures. Various issues are emerging about the use of technology in trial procedures which highlight that the day to day performance of justice is a very human exercise often involving vulnerable individuals whose reactions and responses to developments in a court process may be unpredictable, yet entirely legitimate and genuine. Let me mention just a few areas of concern that I have come across which I believe characterise the complexity and subtlety of the issue.

39. First, there is the risk that a combination of video recorded evidence and delays in criminal proceedings can create a court environment which *itself* causes trauma to both witnesses and victims. A cognitive behaviour therapist described to me an issue that I had not foreseen, based upon an experience the therapist had experienced with a client. It related to the welfare of a 16 year old girl in a sex case who, in order to prepare for trial, had been asked to refresh her memory by watching her ABE interview, which might have been recorded a long time earlier (18 months). The delay had been caused by the deferral of the charging decision by police which is an increasing phenomenon

caused by a variety of resource based problems confronted by the police, a topic beyond the scope of this address. The therapist spoke of the intense distress caused to the teenager by having to watch a younger version of herself recount the details of a traumatic assault upon her. Crucially, she was required to confront the horrors of the attack before it had been broached in counselling. Therapy sessions often build up slowly, over time, before a traumatic event is broached. The result was that the trial system undermined many months of treatment and created new trauma, and, in the opinion of the therapist, risked adversely affecting the evidence the victim would give in court.

40. Then there is the thorny question of demeanour. Body language is an integral part of normal, everyday, communication[33]. The view of the law about demeanour has been changing over recent years. In several judgments, judges have doubted the probative value of demeanour evidence due to the inability of judges properly to evaluate such evidence.

41. But, be that as it may, the giving of evidence in recorded form or over a live link can dim or shroud the non-verbal element of communication. This might be important. A body of research indicates that when complainants in sex cases are asked what special measures they want to facilitate them giving evidence, a significant number choose to give live evidence in court but shielded from the defendant by a screen so that they can be fully seen and assessed by the jury. Witnesses felt that giving evidence over live link might be considered by a jury to be second best and might hinder their ability to convey the full experience of what had happened to them[34]. If witnesses think in this way, it is probable that some jurors also do and this raises the risk that video link evidence may be sub-optimal in conveying the true value of evidence. Significantly, the Supreme Court in *Kiarie* in 2017 has fired a warning shot across the bows of digital justice when it held that remote digital evidence systemically risked being inferior to live evidence in cases where credibility – which could involve evaluating demeanour – was at stake. In consequence (and taking into account a series of other factors not connected to technology, such as cost), the Court held to be unlawful the system of out of country appeals as in breach of human rights (in particular Article 8) and the ability to have an "*effective*" hearing to enforce such rights.

42. Then there is digital exclusion: In late 2016 the "*Transforming Our Justice System*" White Paper set out plans to overhaul the justice system in England and Wales, including significantly increased use of remote (i.e. video and telephone) hearings, a new digitised probate system, with applications made and managed online, a new online divorce application, a new process for making guilty pleas to certain criminal offences online, and moving the Social Security and Child Support Tribunal online. There may very well be much to commend the greater use of digitalisation in the courts and there are positive indications of early success. But this rapid transformation of the justice

[33] The famous research of Professor Albert Mehrabian on the relative importance of verbal and non-verbal communications suggested that 93% of communication was accounted for by tone of voice and body language (Mehrabian "Silent Messages" (1971)). Subsequently other researchers criticised the analysis suggesting that it was exaggerated. Later still Professor Mehrabian countered that his analysis had been misinterpreted and taken out of context and he accepted that the figure might not always be as high as 93%. But whatever the precise delineation of the relative force of words, tone of voice and body language, all agree that to some substantial degree non-verbal communication is important in conveying messages and meaning.

[34] See Majeed-Ariss, Brockway, Cook and White "Could do better: Report on the use of special measures in sexual offence cases (2019) Criminology and Criminal Justice, pages 1 – 18 especially pages 11 – 13.

system creates a risk of digital exclusion by segments of society who by reason of status, age or wealth, do not have ready access to technology. This risk of exclusion of the "*computer challenged*" was recognised by Briggs LJ in his report "*Civil Courts Structure Review: Final Report*" [35]. A report prepared by Justice in 2017 analysed the issue and made a series of 19 recommendations mostly designed to minimise digital exclusion[36]. The problem is exacerbated in an era where those seeking to establish rights have no access to legal advice.

43. My object in highlighting these somewhat disparate examples is not to undermine digital justice. I am cautiously optimistic about the ability of the wise deployment of technology to enhance access to justice. I suspect there are many benefits to be realised. My object is to identify the risk of not melding digital justice with protection of human and fundamental rights. Grappling with this imperative now will facilitate the use of technology in the justice system in a way which engages public confidence.

F. No-go areas

44. I wish now to shift from technology to a different issue concerning human rights and accountability. I refer to "*no go*" areas i.e. subjects that are beyond the jurisdiction of the courts. When the State defends a controversial decision or policy it is natural for the limits of justiciability to be tested. To date arguments designed to limit justiciability have focused upon whether the area under challenge is "*political*" or of "*high policy*" or whether any legal test can be properly framed, or whether the matter is better regulated elsewhere such as in the legislature. The judgment of the Supreme Court in *Miller & Cherry*[37] has put many if not all of these arguments to rest.

45. It might be a sign of the times but arguments surrounding this issue are growing across the world.

46. Another recent judgment of the US Supreme Court highlights the sensitivity of the issue. There the issue has arisen whether overt political gerrymandering in the setting of political boundaries is susceptible to challenge in the courts. In the past the courts have held that it is. But in a recent judgment of the Supreme Court, *Rucho et al v Common Cause et al*[38] *("Rucho")*, the Republican majority held that nakedly partisan gerrymandering was non-justiciable. They acknowledged that the conduct was

[35] (2016), p. 38, para 6.17, At para 6.5.2 of the CCSR, Briggs LJ described "*difficulties of various kinds with computers*" as one of the "*main criticisms*" of his Online Solutions Court.

[36] These included: (i) increased investment in "trusted faces" in "trusted places"; (ii) identifying and addressing hard to reach cohorts, the homeless and detainees; (iii) designing online justice services with an independent "look and feel" to reflect the constitutional independence of the courts; (iv) helping people move with ease between digital access, phone assistance, face-to-face assistance, and paper; (v) ensuring access via the most affordable and ubiquitous mode of digital mobile interaction; (vi) ensuring end-to-end pilots of online justice services and maximising learning from such experiences; (vii) researching how people behave in an online environment; (viii) collecting and making available the widest range of data possible to support research by external experts. At present the roll out of digital systems has not replaced paper systems so that litigants have choices. The risks become much more acute if and when digital systems replace paper systems and become the only point of access to a justice system.

[37] Ibid see reference at footnote [1] above.

[38] Appeal from the US District Court for the Middle District of North Carolina No. 18–422. Argued 26th March 2019; decided June 27, 2019.

undemocratic and unjust but, nonetheless, held that it was beyond the reach of the courts.

47. Chief Justice Robert (for the 5:4 majority) held that partisan gerrymandering claims were purely political and beyond the remit of the federal courts. There was no sufficiently clear and precise test that could be used to differentiate between the neutral and the political. Moreover, the Framers of the Constitution had not contemplated that election gerrymandering would be dealt with by the Courts but should be left to legislative solutions. At the end of the opinion the Chief Justice observed:

> "No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority… In this rare circumstance, that means our duty is to say "this is not law.""

48. In her dissenting judgment for the Democratic minority Justice Kagan did not mince her words of condemnation. She retorted:

> "For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities. And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government. And checking them is not beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes

tragically wrong. Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core."

49. The minority pointed out that the effect of the majority judgment was to place the remedy for gerrymandering in the hands of those who so enthusiastically endorsed the practice. Justice Kagan, in her recitation of the facts, gave an example from Maryland where the Co-Chairs of the Redistributing Committee of the Assembly instructed a "Republican districting specialist" to draw up a new map. One Co-chair explained the criteria behind the map in the following manner: "*I think electing Republicans is better than electing democrats. So I drew this map to help foster what I think is better for the country*".

50. In this jurisdiction, until the Brexit disputes, we have not entertained anything as controversial or divisive as *Rucho*. The issue of Parliamentary privilege has though raised questions about the relationship between the courts and politics. The Courts recognise the fundamental role that free speech plays in the ability of Parliament to perform its role in holding the Executive to account and in giving voice to issues of genuine public concern. Privilege has been recognised as being compatible with the European Convention on Human Rights[39]. Yet, there is scope for abuse. In a recent speech[40] the Lord Chief Justice voiced concern that abuse of privilege could undermine the rule of law and harm fundamental rights. He pointed out that, whilst in the *application* of the privilege Parliament was the sole judge of use and misuse[41], nonetheless the *scope* of privilege was an issue of law and was for the Courts to determine and was limited to acts and comments linked properly to the core functions of Parliament. This point was reiterated by the Supreme Court in *Miller & Cherry* who have, in a passage not widely picked up by commentators, reiterated the point[42].

51. In *R v Chaytor*[43] various MPs were prosecuted for expenses fraud. The Supreme Court rejected a submission that privilege was absolute and the charges were non-justiciable and outside judicial control. The scope of privilege turned upon whether scrutiny of the expenses claims in criminal proceedings would have an adverse impact upon the core or essential business of Parliament and whether it would inhibit debate or freedom of speech. Lord Philips concluded that such scrutiny would not "… *inhibit any of the varied activities in which Members of Parliament indulge that bear in one way or another on their parliamentary duties. The only thing that it would inhibit would be the*

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[39] *A v United Kingdom* (2002) 36 EHRR 917.

[40] "Parliamentary privilege – Liberty and due limitations" 21st Commonwealth Law Conference 2019 Livingstone, Zambia, April 9th, 2019. The Lord Chief Justice stated: "4. *The importance of this privilege, and particularly the part which protects freedom of speech in Parliament, cannot be overstated. It is essential that legislators are able to carry out their role without fear of arrest or fear that what they say in Parliament may be subject to executive action or proceedings in the courts. Just as judges must be protected by immunity from suit and by security of tenure, to ensure that they too can properly discharge their constitutional functions without fear of improper pressure, so too must legislators. They require protections to enable them to engage in robust debate, to canvass issues and press points that may be unpalatable to governments, to Heads of State, and to other powerful people or interest groups without fear of reprisal. Democracy depends upon such protection. The privilege extends to those who give evidence to Parliament through its committees. Parliamentary privilege has rightly been described as a "fundamental liberty" and as a principle of the "highest constitutional importance*".

[41] Ibid paragraph [16]

[42] Ibid paragraphs [65] and [66] in relation to Article 8 of the Bill of Rights 1688.

[43] [2010] UKSC 52, [2011] AC 684 at paragraph [48].

making of dishonest claims." The extent and scope of the "*contours*" of parliamentary privilege is a matter for judicial interpretation[44].

52. Lord Philips cited precedent explaining that the maintenance of privilege was due the principle of mutual trust. Thus, in *R (Jackson) v Her Majesty's Attorney General*[45] the House of Lord has stated: "*In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality . . . is maintained to a large degree by the mutual respect which each institution has for the other*". The conclusion of the Lord Chief Justice in his speech, based as it was upon a careful synthesis of case law, was to similar effect:

> "21. The essential point: a court determining whether something falls within the scope of privilege depends on whether it goes to the "core or essential business" of Parliament. That goes to the heart of the privilege itself, and of article IX. It is to protect Parliament so that it can carry out its functions. Determining such questions requires courts to be sensitive to the rule of law. It requires them to be sensitive to the separation of powers. The former because if they give too wide an interpretation of what falls within the ambit of privilege they could provide the basis for parliamentarians to engage in criminality with impunity. It could form the basis for parliamentarian corruption going unrestrained and undeterred. Too narrow an interpretation could equally undermine the rule of law as it could place undue restrictions on what parliamentarians can properly say and do, thus placing them at the mercy of legal action by the executive or vested interests. So care needs to be taken to ensure that the privilege is not interpreted in ways that could undermine the rule of law. Of course, in the event that courts interpret privilege in ways that, as the Joint Committee on Parliamentary Privilege put it in 2013, "*are wrong or damaging*", then Parliament "*has the power to change the law*". That is the proper way to proceed where Parliament believes the courts are applying or interpreting the law in ways that it considers wrong."

And:

> "Comity, arising from the separation of powers, and the rule of law do not simply place an onus on the courts to respect the boundaries, and to police the boundaries of privilege with care. They also place an onus on a legislature and its members individually, together with the executive, to act compatibly with the rule of law. Comity is to be exercised by all three branches. Just as the executive respects decisions of the courts (and the courts accord respect to the executive acting lawfully within its sphere of activity) so too should the legislature respect decisions

[44] See also *Warsama v Foreign & Commonwealth Office* [2018] EWHC 1461 (QB).
[45] [2005] UKHL 56; [2006] 1 AC 262 at paragraph [125].

> of the courts. This is not simply a question of comity. It is an application of the constitutional principle of the rule of law."

53. Courts elsewhere have resisted the argument that privilege is "*absolute*". The Supreme Court of Ireland[46], having regard to the historical linkage of privilege under its domestic constitutional law with privilege in Westminster[47], concluded that the doctrine was not absolute under Irish law and in certain circumstances conduct ostensibly within the confines of parliamentary procedures could nonetheless be reviewed in the courts[48].

54. The Supreme Court of Canada has also held that the scope of privilege must be limited to that which is, in the view of the court, necessary. In *Canada (House of Commons) v. Vaid*[49] the Court observed that the framers of the Constitution had used the House of Commons in Westminster "*as the benchmark for parliamentary privilege*". Legislative bodies did not constitute "*enclaves shielded from the ordinary law of the land*". There the issue was whether conduct by the Speaker of the House in dismissing an employee of the House was an unlawful constructive dismissal for improper reasons. Relations between the legislature and employees were a category of relationship protected by privilege, but it was still for the courts to determine the scope (including therefore the limits or contours) of a category of privilege[50]. To delineate between the privileged and the non-privileged a test of necessity was applied. To sustain a claim of privilege, the claimant of that protection had to show that the sphere of activity for which privilege was claimed was so closely and directly connected with the fulfilment by the legislature of its functions as a legislative and deliberative body, including its work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency. If the claim to privilege was made out then, within that sphere, the courts would leave its supervision to the legislature. A central rationale for this test was accountability – the Court would not wish to interfere in that part of Parliaments work which properly holds the Executive "*to account*"[51].

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[46] *Kerins v McGuinness and O'Brien v Clerk of Dail Eireann* [2019] IESC 11 and 12.
[47] Ibid paragraphs [8.20ff].
[48] See paragraph [15.2] for a summary of the position. The Court held, *inter alia*, that the Courts would refrain from "*making orders which would have the effect of impermissibly inhibiting the Oireachtas in its work*". The Court also observed that: "… *the privileges and immunities of the Oireachtas, while extensive, do not provide an absolute barrier in all circumstances to the bringing of proceedings concerning the actions of a committee of the Houses of the Oireachtas. In so holding the Court was not persuaded by the argument put forward on behalf of the PAC and the State respondents to the effect that the existing case law (which is considered in more detail in the judgment) has only recognised an entitlement of the Court to intervene in cases where the coercive power of the State is being applied to a citizen who is not a member of the Oireachtas. However, in recognising that there is no absolute barrier, the Court nonetheless recognises that proceedings cannot properly be brought which either (a) would involve the Court breaching the privileges and immunities expressly set out in Article 15 or in acting in a manner which would invoke a jurisdiction in respect of matters closely connected with those privileges and immunities; or (b) which would otherwise amount to an inappropriate breach of the separation of powers*." The Court emphasised that the primary role of providing a remedy where a citizen is affected by unlawful action, which occurs in the course of the conduct of the business of the Oireachtas, lies with the Houses themselves. In addition, the Court had a very wide margin of appreciation as to how their business was conducted. The "*… jurisdiction of a court to intervene can only arise where, as a result of an assessment of all of the circumstances of the case, there has been a significant and unremedied unlawful action on the part of a committee*".
[49] [2005] 1 SCR 667.
[50] Ibid paragraphs [48] – [70].
[51] Ibid paragraph [41].

55. It remains to be seen to what extent "*no go*" areas become a real issue in the future following *Miller & Cherry*. The recent judgment of the Supreme Court in *Privacy International*[52] which severely limits the scope of Parliament to oust the jurisdiction of the High Court suggests that the courts will not lightly relinquish their supervisory responsibilities.

56. A variant of non-justiciability is curtailed supervision. This arises where, even where the Courts assume jurisdiction, they supervise the state with a gentle touch. Academic literature and commentaries and judicial utterances abound with terms such as "*wide margin of appreciation*" or "*wide margin of discretion*" or "*light touch supervision*" or "*caution*" or "*due circumspection*". These imply that the courts will accord decision makers a degree of latitude and will exercise considerable restraint before deciding to intervene. Of course, decision makers prefer this. They are not, in the main, grateful for the "*Judge over your shoulder*"[53]. Yet it is (usually) understood (often more when politicians are in opposition than in Government) that judicial challenges to Executive behaviour are a necessary, if not always welcome, tension in the system and improve standards of good administration.

57. But there are pressures. Peering into the future, law will can only ever become more complex in response to the growing power and internationalisation of industry. Regulators are increasingly armed with extensive armouries to counter such matters as global abuses of market power, fraud, cyber-attacks and invasions of privacy. The powers of regulators such as the Competition and Markets Authority ("CMA"), the Financial Conduct Authority ("FCA") and the Information Commissioners Office ("ICO") to impose substantial fines for corporate misdeeds are extensive.

58. I was struck recently by a detailed submission prepared by the CMA to the Secretary of State for Business. In that submission a case was advanced for a substantial increase to the regulatory armoury of the CMA said to be necessary, at least in part, to enable regulation to reflect the changes from an analogue to a digital world. I do not comment upon the merits of the desire for increased powers. The point that interested me was the contrast in the CMA's submission between seeking increased powers of intervention and punishment yet complaining about the existence of appeal routes available to those subject to such increased powers and sanctions. The CMA did not, of course, argue for non-justiciability but it did wish to ameliorate judicial supervision. It has argued that the supervisory function of the courts and tribunals exerts a chilling impact upon its efficiency. I am not able to comments upon the impact upon the CMAs workings of the fact that it is subject to appellate and supervisory processes and pressures. But the argument raised by the CMA does concern accountability. There are three observations I would make, largely at the level of principle. First, accountability necessitates that those with power should be required to explain and justify their decisions in public and in the courts, and there has to be some relationship between the degree of power exercisable and the nature and intensity of the supervision. Second, diluted accountability weakens incentives upon decision makers to get their decisions right in the first place. Third, it is well established as a basic principle of law that in both appeals and in judicial reviews the Courts calibrate the intensity of scrutiny and

[52] Ibid see reference at footnote 11 above.

[53] The Government Legal Department ("GLD") publishes (and updates) a document entitled "*The judge over your shoulder — a guide to good decision making*". This is a lengthy document (c100 pages) designed to explain to civil servants how judicial review works.

supervision so that it fits with the context to the decision under challenge so that even if in an instant case a court or tribunal goes over the top and intervenes too closely (and a decision maker properly feels hard done by) that is not a reason for legislative interference; it is on the contrary a reason for a closer debate between litigants and judges as to what the proper level of supervision should be.

G. Systemic breaches: The new approach to protection of rights

59. Before pulling some threads together I want to turn now to a legal development in the way that human rights violations are challenged. In most cases individuals claiming human rights breaches challenge an individualised, one-off, decision or act. Three recent judgment of the Supreme Court (*DSD*[54], *UNISON*[55], and *Kiaire*[56]) illustrate the emerging body of case law that is recognising that breaches of the law can also be "*systemic*". In each case there was no objection to the ostensible objective being sought by the conduct, policy or rule being challenged. But in each case the Court found a breach because the system put in place to achieve that otherwise lawful object failed and (critically for present purposes) put a human right at jeopardy. In each case the Court examined the system as it worked in practice from a nuts and bolts perspective and found the system wanting. And since that failure jeopardised human rights there was found to be a breach of the law (common law and/or Convention)

60. In *DSD* the Supreme Court endorsed a High Court ruling[57] that the system set up by the police to investigate serious sex crimes was, in its practical operation, systemically flawed. The Court upheld the finding at first instance that the police were liable to victims of the black cab rapist (John Worboys) under Article 3. This is explained by case law as being fundamental to the ability of individuals to hold the state to account. This was not a case where the police had a policy which was systemically flawed: to the contrary at the broad, macro, level the police had instituted all sorts of admirable policies relating to the investigation of serious sexual offences against vulnerable woman. The breach was the systemic failure by the police, below this top level of recognition, to create a system which enabled the higher principles to be observed. The Court identified as systemic flaws: failures to train, failures to supervise and manage; the adoption of inappropriate clean-up pressures (due to resource constraints); failures to use intelligence resources; failures to take steps to maintain confidence with victims; failures to put in place proper reporting systems; and, failures to provide adequate funding and resources[58]. These failings were not one-offs; they were widespread and ingrained into the systems being applied by the police.

61. In *UNISON* the Supreme Court identified a different type of breach. The Court held that the *structure* of subordinate legislation setting the level of fees payable by claimants seeking to use employment tribunals was systemically a violation of the common law right of access to a court, which, for reasons I have already addressed, was linked to fundamental issues of accountability. The Court examined the absolute level of fees in the context of up to date evidence (including that not before the Court of Appeal) about such matters as: (i) their affordability; (ii) the impact of the

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54 *DSD and NBV v Metropolitan Commissioner for Police* [2018] UKSC 11.
55 [2017] UKSC 51.
56 [2017] UKSC 42.
57 [2014] EWHC 436 (QB).
58 Ibid paragraphs [244] – [248].

introduction of those fees upon actual rates of decline in the commencement of proceedings; and (iii), the scope and effect of the power of the Minister to waive or discount fees. The Court classified claimant employees as, in effect, vulnerable by category because, by their nature, they were in an asymmetrical power relationship with employers, a point recognised by Parliament as warranting redress.

62. In *Kiarie*, the Supreme Court was concerned with the proportionality and legality under Article 8 of rules governing the deportation of foreign criminals *prior* to any appeal. The Supreme Court held that on the facts available the rules which conferred only out of country appeal rights were such that the right of appeal was not "*effective*", which it had to be under well-established case law[59]. The Court considered the practicalities of conducting an appeal from abroad over video link or by skype including: access to legal aid; access to relevant evidence, documentation and witnesses (which would *prima facie* be located in the UK); the availability abroad of facilities from where the appeal could be conducted and the ease with which foreign authorities would permit foreign proceedings to be conducted from their jurisdiction; the quality/reliability and cost of the equipment needed to conduct an out of country appeal; the quality of the receiving equipment in the domestic tribunals; the reliability of links between the two jurisdictions; the ability of litigants aboard to case manage the litigation and hearing process; the ability of litigants to cope with remote cross-examination from a questioner whom the litigant might not be able to see; the ability of a judge in this jurisdiction to assess properly the demeanour of the out of country witness over a digital link. The Court held that whilst there was a legitimate objective sought to be served by the rules in question the real-life ability of a person to exercise appeal rights under the rules was not effective and that accordingly those rules violated Article 8. The Court adopted a proportionality analysis, but the conclusion amounted to a finding that the rules gave rise to a systemic breach of a fundamental human right.

63. A number of points arise: First, a systemic breach can be structural (for example in the form of legislation such as in *UNISON*) or based upon high-level operational but widespread fallings (such as in *DSD*). Second, a systemic breach can be due wholly or in part to a failure to allocate adequate resources <u>if</u> in practice it undermines a fundamental norm. There was a financial element to each of the Supreme Court cases that I have referred to. Third, findings of breach are highly fact sensitive and require judges to make specific findings about the impact of systems upon rights. Fourth, a breach arises where there is a <u>risk</u> of human rights being undermined i.e. there is no need to show actual harm.

<u>H. Conclusions: Pulling threads together - predictions</u>

64. I would like now to conclude by gazing into the crystal ball to identify what seem to me to be some key legal issues for the future. There are ten points or predictions I wish to make.

[59] Ibid paragraphs [48ff]. See for a domestic illustration *R (Gudanaviciene) v Director of Legal Aid Casework* [2014] EWCA Civ 1622 at paragraphs [65ff].

Accountability as a core principle

65. First, I think that accountability will increasingly be recognised as a lynchpin principle. It already underpins a wide array of important principles and has loomed large in an increasing number of Supreme Courts judgments. It is an important optic through which to view disputes about rights.

The merging of human and fundamental rights

66. Second, the Brexit cases concerned the ability of private citizens to exercise rights of access to a court to ensure effective accountability as between Parliament and the Executive. These individuals were not enforcing human rights such as those set out in the Convention, but they were seeking to protect their rights to participate in the democratic workings of the state. They were described by the Court as both "*foundational"* and *"fundamental"* rights. The way in which courts articulate such constitutional rights (see for instance the description used by the minority in *Rucho* - "*… the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives*") is by the use of language that could readily be termed as the human right to participate in a democracy. In the European context it is relevant that under A3P1 of the Convention the right to participate in free elections is a human right thus indicating that democratic rights are already an acknowledged species of human right. I think that in so far as there is a real distinction between such rights and more traditional human rights this will erode in the coming years and the taxonomy of human rights will expand, including beyond the narrower confines of instruments such as the Convention.

The curtailing of non-justiciability

67. Third, in so far as justiciability was not put to bed in *Miller & Cherry,* I expect to see the courts over time curtail the scope of "*no go"* areas. The present trend is in the opposite direction to that of the US Supreme Court. The approach adopted in *Miller & Cherry* was to meld justiciability with the merits. A decision to prorogue was not justiciable <u>if</u> it did not frustrate the ability of Parliament to hold the Executive to <u>and</u>, if it did, there was a reasonable justification. Conversely, if on the facts, the Executive <u>did</u> frustrate Parliament's constitutional functions and did <u>not</u> have a reasonable justification, then the decision to prorogue *was* justiciable. Put another way, a lawful exercise of Executive power would be non-justiciable but one which unjustifiably thwarted fundamental rights <u>was</u> justiciable. Such disputes might well be a bi-product of periods of high political controversy, such as that governing politics about Brexit. Perhaps when politics has quietened, there will be less pressure on the courts to grapple with such cases.

Transparency and openness in a digital world

68. Fourth, with increased use of digital decision making and digital courts I believe that the principles of legal certainty, openness and transparency - all building blocks of accountability and all instrumental in ensuring that the courts can perform justice – will grow in importance.

Reinvigoration of the common law

69. Fifth, I believe that the common law will play an enhanced role in protecting rights. Many leading cases now focus upon the common law as the first port of call. This was so in *UNISON* on access to a court, in *Kennedy*[60] and *Cape*[61] on open justice and access to information, and in *Miller & Cherry* on the "*foundational"* constitutional rights of accountability. This might well be a reaction to the waning enthusiasm amongst some for the HRA 1998, the Convention and the Charter of Fundamental Rights and in the absence of a written constitution guaranteeing observance with human and fundamental democratic rights. The re-invigoration of the common law has benefits in that it is flexible and can adapt to changing circumstances, as case law demonstrates. It has disadvantages if it deprives the courts of the ability they have under EU law and the HRA 1998 to set aside law inconsistent with directly effective rights or make declarations of incompatibility. I doubt that the common law will ever have to grapple with the jurisprudential battle ground of natural law *v* positivism. This would only arise if the HRA were repealed and a case then arose where Parliament explicitly set out to violate fundamental human rights. I am however a natural optimist in life, and do not anticipate that Parliament would ever allow this scenario to arise[62].

System challenges

70. Sixth, I expect to see more challenges to the <u>systems</u> being operated by State and public bodies. Challenges to decisions based upon AI and machine learning might be candidates. If an authority takes decisions based upon skewed data sets and algorithms, then the courts might on the facts condemn such systems outright upon the basis that they <u>risk</u> thwarting or undermining human rights. If *prima facie* evidence is adduced to this effect then courts might place the burden of showing that a system is justified (fair) upon the state, as in *Kiarie* and in *UNISON*.

Rolling the sleeves up

71. Seventh, I believe the Courts will entrench the principle that human rights must be enforced "*effectively*". This was the gravamen of the judgment in *Kiaire* where the Supreme Court, adopting a granular approach to the evidence, evaluated the quality of justice in a remote, digital, setting and found it wanting. It has been a feature of recent Supreme Court cases that they have closely scrutinised the most up to date available evidence, including material not before the lower courts. The courts approach this task with insouciance. In *Miller & Cherry*, when deciding whether the prorogation "*frustrate[d] or prevent[ed] Parliament's ability to perform its legislative function and its supervision of the executive*" the Court commented that this was an exercise which presented *"... no greater difficulty that many other question of fact which are routinely decided by the courts*[63]."

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[60] *Kennedy v Charity Commission* [2014] UKSC 20.
[61] *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38.
[62] See the discussion in *Privacy International* (ibid) at paragraphs [100]-[101] in relation to attempts by the Executive to introduce a broad ouster clause into immigration legislation and the hostile reception this received from within Parliament.
[63] Ibid paragraph [51].

The evolution of proportionality?

72. Eighth, I predict that the courts will over time come to settle upon a new single test for evaluating human and fundamental rights.

73. In *Miller & Cherry*[64], the Court identified two tests. The first asked whether the effect of the prorogation frustrated or prevented without reasonable justification the ability of Parliament to perform its constitutional functions.[65] The second was based upon the "motive" of the decision maker. The Court held that the motive test applied only if upon application of the effects based test there was no unjustified adverse impact upon the constitutional functions of Parliament[66]. Since the Court held that on the evidence there was such an adverse effect, the Court did not need to go on to consider purpose or motive. Importantly the Court therefore left motive or purpose as a potentially valid ground of challenge, as indeed the judges of the Inner House of the Court of Session demonstrated in their judgments,[67] when they found that the prorogation was motivated by an unlawful purpose.

74. The tests applied in *Miller & Cherry* would seem to apply outside the field of constitutional rights. The Court there drew inspiration from the decision in *UNISON*, which was a classic human rights case about access for litigants to courts under the common law as well as the Convention and EU law.

75. But none of this is proportionality which is the more traditional optic through which such rights are considered. Though, standing back, the approach seems similar. In *Kiarie* a near identical effects based approach was applied but under the heading of proportionality. I would make a somewhat sweeping point here about semantics. If one looks across a range of different public law and human rights judgments in the European Court of Human rights, the Supreme Court, and indeed in the Court of Appeal, the test articulated seems to vary without it always being clear why that particular test or variant thereof has been used. In some domestic cases courts sometimes peers closely at the Strasbourg jurisprudence on a particular issue and then treat the line of cases being scrutinised as laying down the definitive word on how proportionality applies. But the precise language used to describe the test and its constituents are not always described consistently and differences in the way in which the test is described in different cases is often due to the type of case and factual scenario arising and the desire of the court to match the test to the facts. And in this jurisdiction ne still sees judges paying lip service to "*Wednesbury*" and "*rationality*" to justify their conclusions. There is in fact a veritable hotchpotch of language used in judicial review cases to describe the test being applied.

76. The proportionality test is not an unduly rigid one (as the Supreme Court has pointed out when it has urged courts to avoid an excessively schematic approach[68]) and can bend to circumstances, in particular in respect of the margin of discretion or judgment to be accorded to decisions makers. There is, so it seems to me, little daylight of significance between a flexible proportionality test and the effects and purpose tests

[64] Ibid paragraphs [38]-[51].
[65] Ibid paragraph [51]
[66] Ibid paragraph [54]
[67] [2019] CSIH 49. The Court found that the motivation was to stymie the ability of Parliament to scrutinise the Executive.
[68] For example, in *Lumsdon v Legal Services Board* [2015] UKSC 41 at paragraph [34].

applied in *Miller & Cherry* and in *UNISON*. I can see no reason why the courts do not, over time, move towards formulating a single cohesive principle to govern all human rights cases. I suspect this will centre around proportionality with the courts developing a more coherent set of guidelines to be applied to determining the margin of discretion or judgment to be accorded to decision makers[69]. I suspect also that it will be proportionality because that is the test used in traditional human rights cases and (absent withdrawal from the Convention and repeal of the HRA) it is therefore likely to continue to be the defining test in cases on fundamental rights.

Flexibility

77. Ninth – judicial flexibility. In a digital world the Courts will need to be inventive when deciding how to evaluate complex technology for bias. This is likely to cover disclosure obligations applicable to the data sets and algorithm and then flexibility when approaching the evaluation of the technology. If the technology in issue collides with the forensic ability of the courts to understand the technology then the state might need to intervene to institute standard setting and type approval bodies to regulate the use of AI in public decision making. This might be incentivised if the courts place the burden of proof on the pubic authority to establish that the AI is fair and objective if a Claimant advances at least *prima facie* evidence that it might not be. I think that generally the Courts will adapt and modify its book of remedies to meet new challenges and circumstances, as the Supreme Court did in *Miller & Cherry*. If the courts are both vigilant and flexible then this will in my view send a powerful signal to all public bodies using AI that it needs to be objective and free from bias. A robust judicial response should create healthy *ex ante* incentives and the risks that I have identified may be addressed and overcome.

Politicisation

78. Tenth, politicisation. The courts have been – regrettably – dragged into politics and it has been said that we engage in political decision making. The future holds a new post-Brexit constitutional and administrative law world coupled with profound economic, technical and social change. We will, I predict, continue to be called upon to adjudicate in many sensitive areas in future. But this is nothing new. All judicial reviews have some degree of political hue surrounding them. We do not go out to encourage politically charged litigation. We do not choose the cases we hear. But we cannot shirk the constitutional duty to determine the case before us, *provided* there is a genuine legal principle at stake. Courts are not arbiters of politics, but we are arbiters of legal principle.

79. In all this the premium to be placed upon the courts remaining calm, dispassionate and detached is high. My crystal ball is a bit hazy, but I see emerging from the swirl various phrases which might point the way forward. These are "*circumspection*", "*judicial caution*", "*mutual respect*" and "*comity*". These terms seek to describe a relationship (which should already exist) of empathy (and confidence) between the courts and other

[69] I do not view such an exercise as especially difficult. Case law already provides examples of where some of the most important staging posts might be. To take two extremes, in a judicial review of a Revenue case which turns largely upon the mechanical application of clearly stated taxing criteria there may be scant room for the exercise of judgment; but at the other end of the scale a decision adopted in (say) the health sphere on a highly precautionary and protective basis might well warrant a broad margin of judgment or discretion. There will be many intermediary points between the two extremes.

organs of the State and a legal environment where judges trust Parliament and the Executive, and *vice versa*. They indicate that the way in which the Courts and the other organs of the State might re-set (if that is ultimately what is needed) their relationship is likely to be through the courts focusing upon the appropriate level of margin of discretion or judgment to be accorded to the decisions maker, which in appropriate cases might quite properly be wide, rather than in disputes about the remapping of the borders of justiciability.

And ….

80. Finally, at the heart of *all* of this lies accountability, a central and defining characteristic of our law and democracy.