LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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RESILIENT JUSTICE

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1. It is a particular honour for me, but also a pleasure, to have been asked to give this keynote address introducing the subject of today's session on Resilient Justice in this magnificent room so symbolic of the centrality of justice in the State.

2. One of the characteristics which the judiciary of England and Wales now specifies when seeking the appointment of judges is that they be resilient. That resilience is most commonly required in the day-to-day work of the judge – what I would call individual resilience. We all have endured cases where the facts are particularly horrible, such as those relating to child abuse or terrorism, or where the advocate has repeated the arguments many times over to no effect, or where, however great sympathy may be for one of the parties, the case must be decided according to the law rather than sympathy, and that party loses. At the end of the day or on the next day, we all know how to put that case behind us and to continue with our work, with help from our colleagues which so often sustains us when times are difficult. We also recognise these days that additional help may be necessary. The welfare policies which judiciaries have introduced in recent years have been a beneficial and important part of the progress that the judiciary is making in the modern world. A resilient and supported judge is indispensable to resilient justice. It is important not to forget the individual judge, who bears the brunt of this.

3. However, the wider question is the resilience of justice itself – the ability of the judiciary as an institution to withstand attacks or severe pressure on it which, I regret to say, have been a characteristic of the past year. It is this aspect, institutional resilience or the resilience of the system of justice, about which I wish to speak.

Why attacks and pressure?

4. Whenever a controversial case comes before a court, the result will disappoint one party and is likely to be the subject of criticism. That is part of the ordinary workings of a judicial system. What seems to have occurred, certainly over the past year, has been abuse of the judiciary in democratic states and undue severe pressure placed on the judiciary in such states. Why has this happened?

5. I think part of the reason has been an increase in parties seeking to have issues decided by the court – issues which those in the executive government and in the legislature consider to be more appropriate for legislative or executive action. Sometimes the executive government and the legislators have not understood the wide-ranging changes that have occurred to the legislative framework they have created, particularly through instruments such as the European Convention on Human Rights and some EU legislation. Another part of the reason is the willingness of the judiciary to display its independence by making decisions the executive government or the legislature may not like. People do not like their power being constrained by judges. But, whatever the reason for the abuse, the first key issue is what the judiciary should do to strengthen its position in advance.

The actions required of the judiciary

6. I have a number of suggestions to make but, given that this is merely an introduction to the day, I will briefly highlight my suggestions to strengthen the judiciary's position within our respective states:

    (1) It is essential that the judiciary of each state has coherence and a structure of governance that can protect its institutional independence and the independence of individual judges. Councils for the Judiciary, particularly if structured to be in harmony with the hierarchy of the judiciary, are the obvious answer. No country should be without one in these times.

    (2) The Councils for the Judiciary should support any judiciary that is under severe attack, as the ENCJ has done in the cases of Poland and Turkey. It is important that Councils for the Judiciary in other states do what they can to influence their executives and legislatures to support the action they are taking. Judiciaries need to support each other.

    (3) The judiciary must never enter into political issues.

(4) The judiciary must ensure it discharge its own responsibilities so that it is not open to criticism:

i. Justice must be delivered speedily and efficiently and the system for the delivery of justice modernises when appropriate.

ii. Its own system of internal discipline (with input from members of society) must deal with judges who do not live up to the high ethical standards embodied in a judicial code.

(5) The judiciary should develop ways of working with the legislative and executive branches of the state in a way that does not compromise judicial independence. In democratic states there should be a proper understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together – a form of interdependence.

(6) The judiciary must do what it can to help the public understand the centrality of justice to democracy and to the wellbeing and prosperity of the state. There is, certainly in the UK, unfortunately, a general lack of understanding of the importance of justice and the rule of law which makes it easy for others to attack the judiciary. It is not always possible to promote this understanding through judgments. Informal discussions with leaders of the media and other groups can help to this end.

(7) The judiciary must do what it can to be seen to be addressing more general problems in society such as the need to improve diversity and to reach out to communities and strengthen links.

7. This may seem a long list, and it is by no means comprehensive, but there is much which can be done to strengthen our position.

The response when under pressure or attack

8. The second key issue is how to respond when under attack or put under improper pressure.

9. When an individual judge or the judiciary is put under pressure or attack, then the response of the judiciary must be measured. It cannot be a response by the judge who is under attack. Nor can the judiciary gain anything by answering other than in a judicial tone. Abuse

must never be met with abuse. But answer it must, even if it has to wait till the time is right. If no answer is made, then the slippery slope to the erosion of the influence of an independent judiciary may well begin.

10. Better still is a support which comes from others, whether it be from important groups within the state or from Councils for the Judiciary in other states.

11. But what is most important is always to remember that judicial independence is best served by standing up for justice and being resilient in fighting for justice, an ideal and an institution without which democracy cannot function and no nation can prosper.

12. These remarks are based on my observations as a member of the Judges' Council of England and Wales for 14 years and as a participant in the ENCJ for many of those years. It is also based upon my own personal experience of events over the last year concerning Brexit.

13. After the referendum on whether the UK should leave the EU, an issue arose as to whether the notice under article 50 of the Treaty could be given by the executive or whether it required Parliamentary approval. This was a pure legal issue which had nothing to do with politics. It was the kind of issue that has arisen under our unwritten constitution on many occasions and was accepted to be justiciable. I sat with two other judges in the High Court. We heard difficult legal arguments, subsequently handing down judgment on Thursday, 3 November 2016. The following day, one newspaper printed pictures of the three judges under the headline "Enemies of the People". As is well known, that is a phrase which has in the past been used by totalitarian dictators such as Lenin. It was the language of pure abuse, not legitimate criticism.

14. We gave no answer at the time. As I had been a party to the decision and as an appeal to the Supreme Court was likely, neither I, as the Chief Justice, nor the President of the Supreme Court could comment. There was a particular duty on the Lord Chancellor under our law to defend the judiciary in such circumstances, but no defence was made. However, other media correspondents, and many in Parliament and elsewhere in society, came to the support of the judiciary for simply carrying out their duties to adjudicate a dispute. We received a lot of support.

15. Until the dispute had been resolved in the Supreme Court and the necessary legislation passed by Parliament, it would have been inappropriate for the judiciary to have said anything. We had to wait. However, as I have said, the matter could not be left without comment ever being made. Such a situation could not be allowed to happen again.

16. It had been my intention to say something in a lecture which I am to give on 15th June. However, after the passing of the legislation, I was asked in March 2017 by the Constitution Committee of the House of Lords in our Parliament about what had happened in November 2016. I answered by making it very clear that there is a difference between criticism, which is perfectly proper and necessary, and abuse, which undermines justice itself and which, as such, is unacceptable. I also made clear my view that the Lord Chancellor ought to have acted to stand up for judges and the judiciary. There was no option but to speak and to take a stand for the independence of the judiciary, even if necessarily delayed. It was my duty to do so. It is absolutely central that we stand up and be resilient in fighting for justice itself. If we say nothing, then this undermines the rule of law. I plan to address this further, and in more detail on 15th June, in the Michael Ryle Memorial Lecture.

17. These are difficult times. We have to be ready to defend the rule of law and the independence of the judiciary. It is an obligation each and every one of us has undertaken and we know how vital it is.

18. Thank you