The Judiciary as Guarantors of the Rule of Law
Keynote Speech at the
Commonwealth Magistrates and Judges' Association Conference
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1. Mr Chairman, Chancellor Singh, ladies and gentlemen. First of all can I thank you on behalf of all of us for your splendid welcome to Guyana for this conference. I arrived late on Friday but already I have come to appreciate not only the warmth of your climate but also the warmth of the Guyanese. It is a real pleasure to be here and I know that all of us are looking forward to the next few days.

2. My first thought when asked to speak today was that this is quite a dry subject. My son, who is a commercial lawyer in London helpfully suggested that I should start with a joke – have you heard the one about the rule of law? No, I haven't either.

3. My next thought was about the title – <u>how</u> do we as judges guarantee the rule of law? Well, we make an order. Prime Minister, you have acted unlawfully; worse still, Prime Minister you are in contempt of one of my orders and will go to prison till that contempt is purged. How many of us think that would be difficult? Would we do it? I will leave that question lurking.

4. A few years ago we had an appeal in the Royal Court in Jersey against an order by the Magistrate that a dog should be destroyed. The dog was a cross between a German Shepherd and a Siberian husky. It was a young dog and generally kept inside but one day it

escaped. The two children of the family had a friend playing with them in the garden. The children became excited as did the dog which dog put his paws on the shoulders of the 8 year old girl, a friend of the family, and bit her very severely indeed. Almost certainly there were two bites and the child was left with some serious injury which required stitches. The legal test in Jersey for deciding whether or not a dog should be put down is as follows:-

> "*The test … is whether the dog is of such a dangerous disposition, on the balance of probabilities, that the risk to the public is such that an order should be made for its destruction. In considering that test the Court has to have regard to all the evidence surrounding the incident itself but also to the evidence of the dog's general disposition and, if it should be relevant, evidence of the characteristics of the breed in question*"

5. The Royal Court reviewed the evidence in the case which included – yes, I am not joking – the evidence of a dog psychologist who had two consultations with the dog and decided that the dog was not a violent creature. On reviewing that and the other evidence, the dog was spared. It was not a decision I personally would have made – after all, it was only a dog – but there is no doubt that the decision was reached by the Court having regard to the evidence on the application of the legal test which existed. The media response was perhaps predictably and fiercely critical, and it is clear that members of the public quickly divided into three classes – those

who do not like dogs, who thought the Court had reached a new stage of lunacy, those who did like dogs but fell into my approach of thinking it was just a dog, and those who would not criticise the decision because of all the waggy tails around them. It is probably fair to say that on that occasion the law failed to represent two-thirds of public opinion.

6. In Jersey we have a very strict approach to sentencing in drug trafficking cases. The result of that approach is probably that defendants convicted of trafficking in Class A drugs receive prison sentences some 2 or 3 years longer than they would be likely to get in the United Kingdom. By and large, public opinion in Jersey is thought to be supportive of this approach which forms part of a network of steps taken to tackle abuse of drugs in our Island. The steps have been only partially successful but it is seemingly not possible to establish whether they would be more or less successful without that drug sentencing policy.

7. I have opened with these two examples because I will be returning later in this address to the inter-relationship between the work of the Courts and the work of the media, particularly perhaps these days the work of those on social media.

8. Although it is clear that the expression "*the rule of law*" is one that is found prior to Dicey's "*Introduction to the Study of the Law of*

the Constitution" published in 1885, it is Dicey who is generally associated with the expression. He gave it three meanings:-

i. That no man is punishable or can lawfully be made to suffer in body or property except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.

ii. As a characteristic of the law of the country, not only is no man above the law but also that "*every man, whatever his rank or condition, is subject to the ordinary law of the Realm and amenable to the jurisdiction of the ordinary tribunals*."

    This has the important effect that not only is everyone subject to the law, but more importantly everyone is subject to the same law administered in the same courts. One of the effects of 9/11 and the other terrorist attacks which have taken place since is the increasing international focus on terrorism and the need to be able to deal with those suspected of committing or planning terrorist acts in an efficient manner with the no doubt laudable intention of keeping the most people secure. Frequently though, it would seem that, by the virtue of the fact that convictions or lesser orders are only possible by adducing evidence of terrorist intelligence, there is a risk that different rules will be applied to those cases – the suspected terrorist does not always see the information

which does for him, and indeed he is liable to be tried in a specialist court. This narrow question merits a discussion all of its own and we will have that tomorrow, so I am not going there today.

iii. The constitution of England was "*pervaded by the rule of law on the ground that the general principles of the constitution … are, with us, the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions, the security (such as it is) given to the rights of individuals results or appears to result from the general principles of the constitution*".

9. The third example has sometimes been criticised as representing a rather arrogant approach typical of the great Power that was 19th century England and, undoubtedly, few people would advance the proposition today in quite the same way as Dicey. But the real thrust of it is surely right, however. It is that anarchy is avoided by respect for the law, which is built upon judicial decisions determining the rights of ordinary people, whether as between themselves, or as between them and the organs of the state, and that principle should be at the heart of the constitutional arrangements of the state. It should be inculcated in the thinking of Ministers, legislators, civil servants, and those running public bodies. Our law and custom is that the requirement of legality is

an essential component of all out public institutions and it is one of the functions of both judges and lawyers to keep that requirement alive.

10. Perhaps I can divert momentarily. The Rule of Law has become a more popular topic over the last 30 years or so and from time to time it has been given different meanings. In my own jurisdiction, one rather intemperate politician, now no longer in the parliament, tended to use it only to mean that the judges should be dismissed. By taking that step, he argued, the rule of law could be restored. That counter intuitive approach, which would not fall within Dicey's proposition, illustrates how right Lord Bingham was when he wrote in his book "*The Rule of Law*", that the expression came to have such a wide variety of definition that the time arrived when respective commentators became doubtful as to whether the expression had any meaning at all. Professor Raz commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system in his essays on law and morality (Oxford University Press 1979).

11. Professor Jeremy Waldron noted that in the Supreme Court in Bush v Gore, which decided who had won the Presidential election in 2000, both sides invoked the expression "*the rule of law*".

12. Lord Bingham reached this conclusion:-

"*The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publically made, taking effect (generally) in the future and publically administered in the courts.*"

13. The last 120 years have seen some interesting developments in the structure of law in Jersey, which is the jurisdiction I know most about, but also in the United Kingdom. In the latter, two world wars I think probably had a marked impact in the first 50 or 60 years of the 20th century with the development of executive power, and inevitably the restrictions on liberty which arise as a result. In Jersey for example, there was a housing problem after the Second World War which led to the introduction of restrictions on who could buy property. The purpose of the restriction was to ensure that there would be sufficient properties available for local residents – but achieving that objective of giving the local community the freedom to buy property, meant restricting the rights of others, including those from the other Channel Islands or from other parts of the British Isles from exercising a right to buy. Often therefore one is looking at reconciling the different liberties of citizens, or perhaps even reconciling the restrictions which are imposed.

14. In the kind of political system which most of us understand, the most important freedom is that we can go about our lawful business and enjoy our own possessions without state interference.

15. To achieve that, we accept some restrictions on our freedom. We cannot use our money, in most places, to buy alcohol at 4 o'clock in the morning. We do not permit a person to conduct heart surgery unless he has some form of medical licence. Most of these restrictions come through the elected legislature, which, as a matter of democracy, has the legitimacy to impose these restraints. Applying that philosophy, we have seen the growth and growth of regulations in almost every part of our everyday lives, whether it is giving us limited hours when we can walk our dogs on the beach in the summer or establishing rules which need to be complied with to open a bank account, or to build an extension, or to employ a non-resident or to buy a house. We will all recognise examples of this, depending upon the rules which exist in our different countries.

16. In the early 1920s the then Lord Chief Justice, Lord Hewart wrote a book "*The New Despotism*" in which he argued that freedom was being stolen from the people by public servants who were using discretionary powers given to them by statute to enable them to become masters of the people.

17. Do we blame the legislators for this? Well, perhaps that is likely to be the conclusion which some will favour. Others will claim that

all that is being achieved by the creation of such powers is a structure by which parliament seeks to achieve the maximum good for the most people, even if that involves interfering with the liberty of a few.

18. And where do the civil servants, so blamed by Lord Hewart, fit in with this? Well they are charged by their political masters to ensure that the public gets what it wants. Little by little, the use of executive powers in the 20th century increased. The challenge was met in the United Kingdom, and in Jersey, by either a statutory right of appeal through different vehicles, an ombudsman, or by the courts applying judicial review, the principles of which perhaps are most clearly set out in the GCHQ case where the tests for judicial intervention were set out as resting upon illegality, irrationality and procedural impropriety. In Anisminic, the House of Lords had shown that it was all but impossible to rule out by statutory provision the activity of the judges on judicial review with the inexorable logic that parliament must have intended that the executive body should act in accordance with the law, and if it did not do so, then the courts would naturally be enabled to strike down the abusive action in question.

19. A parallel stream both in the United Kingdom and in Jersey came with the adoption of the European Convention on Human Rights into domestic law. For many years the courts of course had had the power to strike down secondary legislation on the grounds

that the principal legislation did not contain adequate *vires* for what the secondary legislation provided, but now for the first time, the courts had power to strike down secondary legislation as being incompatible with the convention rights. Although parliament baulked at a transfer of power that would enable the courts to strike down primary legislation, it was agreed that the courts would have jurisdiction to make a declaration that the primary legislation was incompatible with the Convention rights in question. This power has been used, albeit sparingly. In the United Kingdom, perhaps the most challenging area has been the question of deportation or extradition to a country with recognised human rights issues such that the person making the order for deportation or extradition would be reasonably sure that in doing so, he was sending a person to almost certain torture and possible execution, in breach of the Convention rights which parliament had adopted as part of the domestic law.

20. Neither the United Kingdom nor the Crown Dependencies (the Channel Islands and the Isle of Man) have a written constitution albeit that one consequence of devolution has inevitably been the requirement to settle in recognisable form the relative jurisdictions of the Scottish Parliament, the Welsh Assembly, the Northern Ireland Assembly and the Westminster Parliament. The interesting constitutional outcome of the adoption of the European Convention of Human Rights into domestic law was that parliament has agreed

a set of principles as part of the domestic law against which future decisions of the parliament in passing legislation, and future activity of the executive come to be measured, not by parliament itself or by the executive, but by the judges. Taking a step back therefore, in both the United Kingdom and in the Channel Islands, the upshot is that over the last 120 years we have seen an increased ability in unelected judges to strike down executive and sometimes legislative action.

21. I cannot of course speak with any authority at all in relation to those Commonwealth countries which have written constitutions, but in many cases, I imagine that at least in theory the constitutional courts have got the same or similar rights in relation to legislation which is considered by the judges to breach the constitution.

22. The title to this address is "*The Judiciary as Guarantors of the Rule of Law*". If one takes the first two meanings of the expression as defined by Dicey, then it is clear that this must be so in the sense that the activity - punishment, removal of property, everyone equal before the law – takes place in the court room where the judiciary hold the relevant power. I wish to focus though on the third meaning – the pervading of our institutions.

23. The interesting word in that title is <u>Guarantors</u> and no doubt it is because I am a lawyer that I will go at it legalistically, which is

quite possibly not what the Secretariat intended. As we all know, a guarantee is not called upon unless the principal debt has not been paid and it follows that, on this third meaning of the rule of law, the judiciary are not considered to be the first line of defence. Indeed if we all paid our debts on time, there would be no need of guarantors. This really does prompt the question as to what place we expect the judiciary to occupy in the constitutional structures of our different jurisdictions.

24. As Lord Bingham points out, the public have a sometimes quite contradictory view of judges. One minute they are considered to be senile and out of touch, and another they are the very people to conduct an independent enquiry into the conduct of others. Then again, they are extraordinarily conservative, well to do upper middle class people, completely out of touch with what real people have to cope with, and they impose savage sentences on those who do not deserve it – and yet, if the judge exercises a discretion to impose a lenient sentence, particularly these days in relation to any form of sexual offence, he is a wishy-washy liberal, unable to punish anyone properly.

25. It is all very well if observers and academics persuade themselves and their colleagues that one can believe in the rule of law without necessarily admiring either the law or the legal profession or the courts or the judges. The reality, however, is that the need to respect the rule of law is one which requires public

endorsement, and that is not achieved by academic argument alone. Of course academic argument is necessary – it is an essential component in being able to persuade the public that the rule of law is an important requirement; that at least our government and legislature should try to act in accordance with it. But the opportunities for trespassing on the power of the courts remain legion. I will divert briefly on this.

26. Many of the most obvious of those opportunities arise in connection with issues relating to the provision of central funds – lucky Guyana, if I may say so, that this appears not to be an issue here because we are told the Judiciary budget is separated from the general State budget. But in other countries, the executive could close a court because it not used sufficiently frequently, or reduce the pay of judges, or scrap judicial pensions or simply effect changes to the budget under which the court system operates. While there is no doubt that any of these steps can be taken for reasons which amount to an assault upon the rule of law, my own view is that, in most of our jurisdictions, they can equally be categorised as legitimate political decisions. There is a limited amount of cash in every jurisdiction's budget, and it could be said that ultimately the elected politicians are the persons who should determine how it should be allocated. While therefore one should be alert to the possibility that those who have no interest in the rule of law, or are positively hostile to it, might use budgetary

constraints as a fig leaf to cover their attack on the judiciary, my own view is that we should appreciate, as judges, that society has changed and judges can no longer simply rely upon their position as a form of *res ipsa loquitur* when it comes to demanding what they see as appropriate budgets for the administration of justice. Clearly, this will receive more attention this afternoon.

27. The discussion about the sensitive subject of budgets takes us neatly into the question about how the judiciary act as guarantors of the rule of law when one is considering Dicey's third meaning – inculcating government and public institutions with the respect for the law that is needed, the recognition that it is a constitutional principle that it is the decisions of individual judges in individual cases which maintain the requirement on the executive and public bodies to act lawfully.

28. In my jurisdiction, and in the United Kingdom one hears often twin statements about teachers – the standard of teaching has dropped and teachers are not held in respect by the pupils as they used to be. I am not in a position to comment on the former of those statements, but I rather fear the latter might be true. One could apply the same test to clergymen. The big question is why this is so, if it is, and why judges should assume that the same will not happen to them.

29. The first and obvious point is that one must recruit into the relevant profession – teachers, clergymen, judges – those with high ethical and intellectual abilities. That means that the terms and conditions of employment must be sufficiently attractive, because if they are not, there is a probability that, following the parable of the sower, the seed will be sown amongst weeds and thistles and what might otherwise grow will be choked by the pressures of business and the financial and other rewards that success in business offers.

30. More importantly, the community must respect what is done. How does one achieve that? In the first place the respect must be earned by the judges who must show that degree of probity, impartiality and ability that minimises the risks of public criticism. It means that decisions must be properly explained, directly and as far as possible avoiding turgid legalese. It means that the right people must be chosen as judges and the structures in place for the selection of judges must be robust. Obviously, all these structures in our different jurisdictions are extremely robust, or we ourselves would not have been appointed!

31. Similarly there must be decent structures for dealing with those occasions where the judges go wrong, either in terms of their conduct with appropriate disciplinary arrangements independent of the state, or in relation to the decisions which they have taken. This

is all pretty humdrum stuff. What perhaps as judges we do not focus upon very frequently however, is the next step.

32. The opinion formers in our communities must be broadly on side, and public opinion must therefore be taken to the point of accepting the necessity – not the desirability – the necessity of the other organs of government being subject to the rule of law. It is necessary that the public should see judicial work not as something which is desirable, and must take its place in the list of other services competing for their respective shares of public funds, but as something which is essential, truly an arm of government. I am with Guyana on this. It is wrong in principle for essential work to have to fight in the governmental budget debates with services which are seen by the public as desirable – good pensions for the retired, good health care for all, good education for the young, good care homes for the old. Once the delivery of justice has to fight for funds against the old or the young or the infirm, it is on the back foot.

33. In our Court, and I imagine in courts across the Commonwealth, we still apply the principle of judicial deference in upholding the actions of government if lawful and reasonable, even if they are not actions which we personally would have taken; and we accept the supremacy of the legislature in making laws which it falls to us to apply or interpret, even if sometimes the interpretation is so difficult one fears the legislature cannot have been paying full

attention when the law was adopted. In both cases, Judges are right to show that deference because we are neither executive nor legislature.

34. At the same time, the other side of the coin is the need for the executive and the legislature to understand that, powerful though they are, they must not trespass on the powers and duties of the Courts. The business of doing justice is not consistent with the pressures which are put on an elected person. The judge is not concerned with the views of the electorate or the media in the same way that those who are elected may be. He or she is concerned with a higher and objective principle – that of doing justice to the litigants before him in accordance with the law.

35. How do we ensure that both Judges and Parliamentarians reach the right conclusions in their respective spheres of influence? Well, Judges are always subject to the Court of Appeal and in our case, if necessary the Privy Council, a constraint which is not available in the case of Parliamentarians. Judges may be guarantors but the principal debtor is the constraint which operates on Parliamentarians and indeed military forces through public opinion. As guarantors, we have our part to play, not only by applying the principles of the rule of law in our everyday work in the courts but also by speaking about the importance of them. Indeed we should <u>all</u> of us talk about the rule of law regularly,

and about the need to protect the courts and the prosecution in the administration of justice.

36. We all realise, don't we, how influential the media can be in informing public opinion, sometimes informing it correctly, sometimes not. In some of our various jurisdictions, particularly the larger ones, I have no doubt that the judiciary has a fully-fledged media department. In Jersey we are too small to have that advantage – but if I go back to my doggy story with which I opened, I can see immediately how the media handling might have been much improved had we gone on the front foot right at the outset. What had in fact happened on that occasion was that, with the vet waiting with the deadly syringe in hand, a decision on whether the dog was to be spared or not had to be made straight away, but the complexity of the evidence was such that the court reserved its reasons. Accordingly the media received the decision (which it thought for the most part was mad) but it did not understand it.

37. It is not just explaining individual decisions which is important. Where possible, we need to talk about the rule of law regularly. It is not easy, is it? It cannot be said that the media will be very interested in a story about the rule of law. It does not carry such immediate appeal as a story which can obtain the headline "*Dog steals vicar's wallet in back alley*" which prompts lots of questions about the dog, the priest and probably the back alley as well. It is

rather counter-intuitive for judges, who like to be independent, and perhaps are rather inclined to sitting in ivory tower courts handing down terribly well-reasoned decisions, elegant in their prose and precise in their direction – or am I just speaking about my own dreams? – but it seems to me that one has to engage directly with the media in a way that 50 years ago would have been unthinkable. I think that comes about largely because the media are less willing than previously to accept a status quo which includes having judges towards the top of the respectability tables.

38. I also think we need to look closely at the way in which we handle social media. Recently in Jersey we had a money laundering case where the defendant had laundered approximately €590,000 over the previous six years, the antecedent offending being drug trafficking. He pleaded guilty, but nonetheless received a sentence of six years imprisonment. Defence counsel had urged us to finish at a lower level, relying on the fact that in one case a business man who had laundered some $30 or $40 million dollars, the proceeds of corruption elsewhere, himself only received six years. The Court considered that first of all there was a limit above which it did not matter very much what the quantity of money laundering was – laundering $40 million is probably not much worse than laundering $10 million – but importantly the Court considered that the relationship with week by week street deals in class A drugs was critical to the sentence which ought to be handed down. The point

of the story is not to discuss the sentence but the response to it on social media. As always with that outlet, no one hangs around for reasons and within an hour or so immediate opinions were expressed, nearly all very positive. Six years? Strong decision. Six years? Serves him right, assisting drug trafficking. We can be gratified at the response to that particular decision but there is nonetheless a lesson in the speed with which the reaction to the sentence was passed from pillar to post across the social media networks, and it has to be said read by many people, not only in Jersey but outside the Island as well. It emphasises how I think we should be considering using the social media networks ourselves as judges, not obviously to engage in discussions but as a mechanism for putting out short and pithy messages about the work which the courts are doing.

39. For many years it has been possible for the judiciary to keep its head down. We could get on with our work quietly and we hope competently and efficiently. We could rely on wigs and gowns, on long words and arcane practices. Although not being arrogant, we could be perceived as such, and possibly get away with it.

40. If that were so once, I am sure those days are now gone. In order to be guarantors of the rule of law, the principal debtor of public opinion must be in the right place in our society and as judges we are called upon to ensure that is so by fearlessly applying Dicey's first two principles – no man is to be punished or penalised

otherwise than by court process and everyone is subject to the same law, applied in the same courts - and as to the third principle, talking about the rule of law regularly and about the need to protect the courts and the prosecution in the administration of justice, weaving the requirement of lawful activity and only lawful activity into the fabric of all our public institutions. It seems to me that we would need to win hearts and minds week in, week out, and we should not forget that because ultimately it is the law which acts as the cement in our society.

41. Thank you very much.