THE FAMILY BAR IN A DIGITAL WORLD

A talk by the President of the Family Division Sir James Munby

at the Family Law Bar Association conference at Cumberland Lodge

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A little over five years ago, when I became President, we were facing reforms so great as to amount to a revolution. One of my themes at the time was that fundamental to the process was the need for a radical change in the culture of the family courts. My message, in short, was that we were facing a cultural revolution. Shortly after I became President, I was sitting in the Court of Appeal with Lord Justice McFarlane, soon, to universal acclaim, to assume office as my successor. The debate with counsel touched on this cultural revolution. Sitting before him on the Bench was a weighty red volume – weighty in both senses of the word – Volume I of Hershman and McFarlane's Children Law and Practice. With the once famous work of Mao Tse Tung in mind (though unhappily those before us were too young to understand the allusion), Sir Andrew picked up the tome and let it fall on the Bench with a mighty crash, observing as he did so, "As we all know, every cultural revolution needs a little red book."

Much has been achieved by all of us in the intervening five years, but much remains to be done. Without going quite so far as Chairman's Mao's call for "perpetual revolution", I believe strongly that this particular revolution is far from over. Today I wish to focus on one aspect: the forthcoming digital revolution and what it will mean for the Family Bar.

We are living through the fifth revolution in information and communication technologies. The first revolution was some 5,000 years ago in what we now call Iraq. The invention of cuneiform script and the clay tablet on which it was inscribed made possible the administrative record-keeping without which government as we understand it is impossible. The second revolution came with the invention in ancient Egypt of papyrus – paper. When the paper roll was superseded by the codex it produced what we think of as the book. The third revolution came with the invention of the printing press in 15th century Renaissance Europe. It is said by some that, without the printing press producing books in unprecedented quantities, the Reformation would never have occurred. The fourth revolution spanned the 19th century and the first half of the 20th century: the successive inventions of the telegraph, the telephone, wireless telegraphy, and the telex, drastically accelerating the transmission and communication of language; the invention of the photograph and then the moving picture; all coming together with the invention of television. The 19th century was revolutionised and massively shrunk in space and time by three things in particular: the international telegraph cable, the steamship and the railway.

The fifth revolution started with the invention and development of the programmable computer in the mid-20th century, followed by the internet and more recently social media. We are still in the middle of this revolution and it is far too soon to know where it will take us. What is clear is that the internet, and more particularly social media, pose enormous

challenges for the law, for government and for society generally – challenges which are only very gradually being recognised and are still in large measure unaddressed.

We have seen much reform of the family justice system in recent years. But the great change in prospect – and this may come to be seen in retrospect as even more revolutionary than all the changes we have experienced in the last few years – is the reform of the court process to bring it into the modern electronic world. This is long overdue, but there is reason to believe that we stand on the brink of changes that would have seemed impossible, impossibly visionary, only a few years ago. Making proper use of modern electronic methods means more – much more – than merely substituting the word processor for the typewriter or the quill pen.

We live in a world in which we do so much online, whether it is buying household goods, paying our bills, booking our holidays, paying our taxes . . . so the list goes on. But how does one issue an application in the family court? If there is still a counter, one can attend the court in order to issue, just as our ancestors did in the days of the late Mr Charles Dickens. Or one can use the post – the latest technology in 1840 but now rather dated. Or perhaps one can send an email – hardly cutting-edge technology. The way of the future must surely be online.

And so to the real revolution: moving, whether we like it or not, to the digital court of the future. We have scarcely begun to harness the real power of IT. As Professor Richard Susskind has pointed out, and it is a profoundly important message, at present we have hardly got beyond using IT to do the things we can do without IT. Moving from the quill pen via the biro and the electric typewriter to the word processor is progress of a sort – though a word processor is really little more than an electronic version of the printing press invented all those centuries ago in the Renaissance. But we must embrace the use of IT to do things that only IT can do.

Recent progress has been rapid, and the pace of change is rapidly accelerating. But we still have a long way to go to the entirely digitised and paperless court of the future, though this is – must be – a vision not of some distant future but of what has to be, and I believe can be, achieved over the next few years of the Courts Modernisation Programme. It is a visionary programme of ambition unprecedented anywhere in the world. But it can be done; it must be done; it will be done. And when it has been done, we will at last have escaped from a court system still in too large part moored in the world of Dickens – a court system that would have been all too familiar to my distinguished Victorian predecessors, Sir James Wilde and Sir James Hannen.

Digital working advances steadily. We have for some time been using a sophisticated electronic diary – fDiary – as the essential tool for listing cases and allocating them to specific judges; it displays at the press of button, for example, the availability for a year or more ahead of individual judges as well as enabling the judicial allocation team and the listing officer to see, in spreadsheet presentation, what all the judges in even the largest court centre are doing, day by day and week by week.

But this is only the beginning, as the family court moves, with ever increasing rapidity, to the online, paperless court of the future, where applications are issued online, and where both

the court file – the eFile – and the hearing bundle – the eBundle – are electronic. Already, many barristers have given up bringing paper to court; everything they need is on their laptop or iPad.

Online applications are being piloted with online divorce as the initial project; planning for pilots for the online issue of private law cases and public law (care) cases is well advanced, as is planning for the online issue of financial remedies cases. The online application marks a deliberate break with the past. The applicant no longer fills in the traditional court form – the divorce petition, for example – but instead completes an online questionnaire carefully designed to tease out all the relevant information in a way which is both user friendly and, so far as possible, fool-proof. The online divorce pilot has been a triumphant success and shows, to my mind conclusively, that this is – must be – the way of the future. It is also proof positive that, notwithstanding general scepticism, Government can 'do' IT.

And, finally, the digital revolution will enable us to carry through a radical revision of both court forms and court orders. The thickets of numberless court forms – I speak literally; no-one knows how many there are, though in the family justice system alone they run into the hundreds – must be subjected to drastic pruning, indeed, radical surgery, before they are digitised. Court orders must be standardised and digitised to ease and shorten the process of drafting and then producing the order.

The family orders project which I established some years ago is now coming to fruition with the issuing, under my imprimatur, of standard forms of order for use in all family cases. The benefits of standardisation are obvious, and will become all the greater as the necessary IT becomes more generally available. The first batch of such orders, dealing with financial remedies case, was issued late last year to general acclamation – indeed, I learn that it is proposed to adopt them in Hong Kong. The second batch, dealing with children cases, will, I anticipate, be formally issued within the next few weeks.

May I quote what I said in the Practice Guidance I issued on 30 November 2017 ([2018] Fam Law 89). I spelt out my vision:

> "Inordinate amounts of time and money are spent – wasted – in the process of drafting orders that could, and therefore should, be standardised … We are no longer living in the world of the fountain pen and biro (which even today still account for far too much drafting of orders) any more than in the world of the quill pen. My ambition, therefore, is that the standardised orders should be available to everyone electronically. The use of standard orders produced at the press of a button will obviate the need for drafts from counsel and solicitors scribbled out in the corridor. It should assist greatly in reducing the time judges and court staff spend approving and completing orders. And the existence of a body of standardised and judicially approved forms of order will go a long way to assisting judges and others – mediators for example – faced with the increasing number of litigants in person who cannot be expected to draft their own orders.
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> In the long run, this project is critically dependent upon the availability of modern, up-to-date, IT in the courts. At present, the full use of standardised orders is still impeded

by the inadequate state of the IT available to judges and courts. FamilyMan, the system with which HMCTS continues to have to struggle, has long been obsolescent and is now obsolete. Although it may, I fear, still be some time before an adequate replacement for FamilyMan is available, the steady implementation of the ongoing court modernisation programme gives real cause for optimism that we will fairly soon be seeing real changes in our IT as the digital court of the future becomes a reality.

> The digital revolution will enable us to carry through to completion this radical revision of court orders and how they are produced. Court orders will be standardised and digitised, with standard templates, self-populating boxes and drop-down menus designed to ease and shorten the process of drafting and then producing the order. Given the marvels of modern IT, why should we not be able to hand every litigant in all but the most complex cases a sealed order before they leave the courtroom?
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> We are not there yet, but I have decided that the time has now come for these draft orders to be placed on a more formal footing."

As I said in the Foreword to Volume 1 of the Standard Family Orders Handbook, edited by His Honour Judge Edward Hess and published in December 2017:

> "The use of these orders will ordinarily, and, I hope, increasingly, be in the context of an electronic drafting process, which will be further assisted in due course by the digitisation of the family courts already in progress … Farewell to the world of the fountain pen and biro! Onwards to the age of digitisation!"

But the most exciting, if also the most challenging, prospect is the one unveiled in the Civil Justice Council's report. In appropriate cases – I emphasise those critically important words – the court hearing itself will be conducted online, everybody participating electronically and without the need for anyone, even the judge, to be present in a traditional court room. Thinking here is still at a very early stage. In my 'message to family judges' included in the family jurisdiction version of the consultation document sent by the Lord Chief Justice to the judges at the end of April 2018 entitled 'Judicial Ways of Working – 2022', I sounded a note of caution:

> "While fully video hearings (where all participants including the judge or magistrate join through technology) are being developed and piloted in other jurisdictions, it is not envisaged that these hearings will initially be as widely rolled out for family cases. There will be scope, as at present, for their use in certain case management and directions hearings. The development of online hearings will need to be carefully evaluated and very careful thought given to which types of hearing in which types of family case will or will not be appropriately conducted online."

Hearings in such cases will be conducted over what we quaintly continue to call video links – though I earnestly hope using equipment much better than the elderly and lamentably inadequate kit to which in far too many court rooms we are at present condemned. At home we are accustomed to watching television on modern screens where both the picture quality and the sound quality are of the very highest. Why should we tolerate, why should we be

expected to tolerate, anything less in the digitised court of the future? As I went on to point out in my 'message':

> "The Reform teams recognise that the digital and video equipment must work effectively in all courts, and that adequate staff must be available to support its operation. This is vital and, as far as I am concerned, non-negotiable."

At this point you may be wondering where this is all going. Time will tell. I merely remind those of you too young to remember those days, that when I was called to the Bar 46 years ago, legal 'high-tech' was the electric typewriter and the telex. There was no fax, no email, no internet, no social media, none of the electronic gadgets – the laptop, the iPad, the list is almost endless – which we now take for granted. Who can know what things will be like in the Family Court in 46 years' time, in 2064? Of one thing I am confident: it will be a world at least as different from the world of 2018 as our world today is different from the world of 1976.

And what, in all this of the Bar, of the Family Bar?

Your dedicated support, matched of course, by your fierce commitment to your clients, typically some of the most disadvantaged and vulnerable members of an often uncaring society, which neither understands nor wants to understand what we do; your endless cheerfulness when handling clients and cases that would deter and demoralise ordinary mortals; your incredible hard work; your consistent willingness to go the extra mile – all this is remarkable. You are truly the largely unsung heroes; in particular, those of you who work tirelessly and pro bono for the parents who would otherwise be unrepresented. You have my admiration and gratitude. All this at a time when, of course, all parts of the family legal profession are subject to acute financial pressures.

And on top of all that, the constant and unstinting help you give the judges.

England is often referred to as the 'Mother of Parliaments'. Parliamentary democracy is indeed one of our great gifts to the world. But an older and even greater gift, and to a much wider world, is the English common law; indeed, the very idea of the rule of law. We have in this country the oldest continuously functioning legal system in the world. A few years ago, we, and the world, celebrated the eight hundredth anniversary of Magna Carta. But our judge-made law is yet older. Even before Magna Carta the King's judges had been travelling on their circuits around the country, as the Queen's judges in unbroken succession still do today. And our law reports, the recorded judgments of the judges, stretch in unbroken continuity for well over 700 years, indeed, since the days of Kind Edward I. Those able to translate the Norman French in which the medieval Year Books were written, and able to decipher the black letter type in which they were first printed in the 17th century, can still read the arguments of the barristers and the decisions of the judges in the Middle Ages.

The English common law is an astonishing achievement. It has retained its vigour down the centuries. It has developed, continues to develop and will no doubt continue to develop, not merely in this country but around the world in continents whose very existence was

undreamed of by the medieval judges who set us on the course which we continue to follow today.

The Bar was fundamental to the development of the common law and remains vital if our legal system is to retain its vigour today and in the centuries – yes, in the *centuries* – that lie ahead. There has perhaps been no better acknowledgment of this than in some words which Hankford J uttered over six hundred years ago, in 1409. I translate the original law French:

> "One does not know of what metal a bell was made if it has not been well hit, in other words, by good disputation will the law be well known."

In a world inconceivable to Hankford J and in a forensic context he would find baffling, the point remains as true today as then.

"Good disputation" is surely what the Bar is all about. But the Bar is also, and we must never forget this, about something even more important. May I repeat what I said in the very first judgment I gave as President (*Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, paras [71]–[72]) when I was at pains to point out just how important is the work you do:

> "the ultimate safeguard for the parent faced with the might of the State remains today, as traditionally, the fearless advocate bringing to bear in the sole interests of the lay client all the advocate's skill, experience, expertise, dedication, tenacity and commitment. There are some principles that ring down the centuries, and the efficacy of the adversarial process is one of them … Most family judges will have had the experience of watching a seemingly solid care case brought by a local authority being demolished, crumbling away, at the hands of skilled and determined counsel. So the role of specialist family counsel is vital in ensuring that justice is done and that so far as possible miscarriages of justice are prevented … May there never be wanting an adequate supply of skilled and determined lawyers, barristers and solicitors, willing and able to undertake this vitally important work."

There can be no higher call on the honour of the Bar than when one of its members is asked to act on behalf of a client facing the might of the State. The Bar, I am sure, will never fail in its obligation to stand between Crown and subject. And the same goes, I am sure, for the other profession.

It is you, the Bar, the Family Bar, who, in the final analysis, stand up for, defend and protect some of the weakest and most vulnerable in our society. It is a vital, a noble, task which, day in day out, I see played out in front of me in courts up and down the land. I watch and admire you, and all you do, with gratitude for what you do and with pride in the Bar of which I was once privileged to be a member. Our fellow citizens are lucky, as are more transient inhabitants of our country, to have available to them such dedication, such commitment, such determination, indeed, such passion. What you do, whether you are the most junior tenant or the grandest silk, really does make a difference to people's lives.

Let me tell you what happened in a case (*Re J (Residence and Contact Dispute)* [2012] EWCA Civ 1231, [2013] 1 FLR 716 para [35]) which to me exemplifies the essence of the Family Bar.

Junior counsel went down to Southend County Court to do a fairly run-of-the-mill contact case. It had some unusual features but I do not imagine that counsel was prepared for what happened. The Recorder stopped her when she began to embark upon a perfectly proper line of cross-examination. The transcript records what happened. Counsel soldiered on for a while. As the short adjournment approached the Recorder said "I am going to curtail your cross-examination …" Counsel made clear that this was hampering her ability to put her client's case. The Recorder was unmoved: "Well that may be but . . . we are where we are." Undaunted, counsel advised an appeal, which succeeded. We said that by preventing her cross-examining as she wished, the Recorder had disabled himself from carrying out the task required of him and denied the father and the child a fair hearing. Of counsel, I said this:

> "[she] is to be congratulated for doing her duty, politely but firmly standing her ground and telling the Recorder plainly that his ruling was preventing her putting her client's case."

That is what the Family Bar is all about: commitment to the client and to fair process; a clear head; and moral courage.

I thank you all. Long may the Family Bar, long may the Family Law Bar Association, continue to flourish.

I know all too well that the Bar is facing enormous and daunting challenges. The Criminal Bar is facing a great crisis, and the Family Bar difficulties perhaps almost as great. But you are skilful and resourceful people. And with determination and courage and wise leadership I am confident that you will meet the challenge and overcome the crisis.

We are the inheritors of great traditions – the traditions of the common law and the Bar. We – judges and barristers alike – are but the temporary custodians of something we have received on a trust conferred on us by generations long gone and held by us for the benefit of generations as yet unborn and for the centuries to come. We cannot, we must not, betray that trust. I know that there are siren voices, acting in good faith and in the conscientious belief that they are doing right, urging various actions to meet the current crisis. But we must take the long view. We must be careful that we navigate the storm without ending up shipwrecked on the rocks. The Bar – the Family Bar – has little to fear if you are willing to adapt what you do and how you do it. As one door closes, another always opens.

The role of the advocate is timeless. Advocates have been around for a very long time. The challenges you face echo down the millennia. The point is nicely brought out in the account of a robing room conversation with a fellow advocate some two thousand years ago which Pliny recounts in a letter to his friend Tacitus:

> "… when I am making a speech I scatter various arguments around like seed in order to reap whatever crop comes up. There are as many unforeseen hazards and uncertainties to surmount in working on the minds of judges as in dealing with the problems of weather and soil."

How often in court have we not all thought that?

We face an exciting, if immensely challenging, future. You all have your part to play, because, whatever else changes, there will, I am confident, always be a need for family lawyers – family advocates and family judges. So, the Family Bar and the Family Law Bar Association will continue – they must continue – to play their vital roles in the family justice system.

Let me end with a story showing that the tide of technological change is no more controllable than the tide which, according to popular legend, defeated King Canute. New technology, if it is quicker, cheaper and more efficient, will always drive out what has gone before.

When Queen Victoria came to the throne, the coaches of the Royal Mail were performing at the limit of the most up-to-date technology of the horse era. State of the art mail coaches, running on Macadam's and Telford's state of the art roads, were travelling enormous distances on very strict and challenging timetables. After Telford had improved what we now call the A5, and spanned the Menai Strait with his astonishing suspension bridge, the Irish Mail coach was running the 261 miles from London to Holyhead in 26 hours and 55 minutes, an average time, start to finish, of a fraction under 10 mph (before Telford's improvements the journey time was 38 hours).

Even more impressive than the technology, perhaps, was the astonishing administrative and logistic underpinning of the mail coaches. Before the invention of the telegraph and before the introduction of national time with the coming of the railways – how do you run a national timetable based on local time? – the coachman could leave Holyhead or London confident in the knowledge that at every changeover point a fresh team of horses would be ready and waiting for a changeover for which by contract a maximum time of 5 minutes was allowed, often reduced in practice to only 3 or even 1½ minutes, before the coach was on its way again.

But the mail coach was doomed by the coming of the railway, for the speed, stamina and endurance of the steam locomotive far exceeded the speed, stamina and endurance of the horse. The horses on the mail coach could run at 10mph. Stephenson's 'Rocket' won the Rainhill trials in 1829 at 30mph. By the late 1840s the Great Western Railway was achieving speeds of 80mph. The horses had to be replaced every 15 or 20 miles. The locomotive was constrained only by the amount of water it could carry. And with the invention of the water-trough – first introduced on the Chester and Holyhead line in 1859 to speed up the Irish Mail so it could run non-stop from Holyhead to Chester – a train could run for 100s of miles without having to stop for water. And almost from the earliest years of the railways – as early as 1838 – the invention and installation of lineside equipment for automatic exchanges of mailbags at high speed meant that the railway Travelling Post Office trains could travel long distances at high speeds and without stopping.

So, in the 1830s modern technology revolutionised the working of the Royal Mail. But in due course that modern technology was in turn replaced. The Royal Mail no longer goes by train. In modern Britain it goes by air or, the wheel having turned full circle, by road again, the internal combustion engine being able to do what the horse could not.

The moral is clear. We must welcome the future with enthusiasm and optimism, lest, like the Luddites, we find ourselves on the wrong side of history.