SAHCA Annual Conference: 14 November 2009

I am delighted to be a part of this conference, and to have had the opportunity to meet many of you last night and to speak to you this morning.

I am of course not only particularly pleased, but also very honoured, to have been invited to be your President. I realise only too well the calibre of whom I follow, Lord Slynn. To do so is a privilege and a challenge. I very much look forward to working with you, especially with your committee, and getting to know those of you whom I do not already know.

When I was asked to speak, it was suggested that I should try to pick up on one or more of the themes of the conference. Looking at your agenda, there were clearly very many important issues that will be covered during the conference.

However, as the only current solicitor High Court Judge - Lawrence Collins being off in the judicial ether somewhere - I thought I should pick up on the next session, and give you some of my own thoughts on the importance of the appointment of solicitors as judges - and, more broadly, of diversity within the judiciary.

We all know that diversity within the judiciary is important. It is a persistent theme of the Judicial Appointments Commission, but also the Lord Chancellor and the Lord Chief Justice. If any of you heard the Lord Chief speak at his conference on diversity last March, held at the offices of Clifford Chance, you will be in no doubt as to the importance he attaches to diversity, and the enthusiasm with which he avows it.[1] That conference concentrated on **how**: how can we make the judiciary more diverse? That is a very good question. It concerns process; and process is important.

We all - including, I know, the Judicial Appointments Commission itself - have gripes about the current procedures for judicial appointment. I am sure that the process can

[1] Lord Judge, *Address to Diversity Conference*, 11 March 2009 (available at http://www.judiciary.gov.uk/docs/speeches/lcj-speech-diversity-conf.pdf).

be made better - and Lord Judge's conference promoted useful discussion of how it might be improved. But I think it is easy to forget that, until 3 years ago (1 April 2006), all judicial appointments were made by, and at least sometimes at the whim of, one politician. Lord Halsbury was a great lawyer, and a renowned Lord Chancellor. This is what has been said about him and judicial appointments:

> "Typical of the appointments Lord Halsbury (to whom it was entirely normal that undistinguished Conservative backbenchers with indifferent practices at the Bar should be appointed to the High Court Bench) made was Mr Justice Ridley. A former undistinguished Tory MP, the brother of the Home Secretary, he had been made an Official Referee. His appointment as a High Court judge was greeted with horror. The Law Times said bluntly: "No one will believe that he would have been appointed to the High Court Bench but for his connections… This is Ridleyism." The appointment of John Lawrence, another Tory MP, was greeted with hoots of derision. The Law Times reported the "bad appointment" with the observation that "Mr Lawrence has no reputation as a lawyer, and has rarely been seen of recent years in the Royal Courts of Justice". The warning was fair. Lawrence was such an incompetent judge that it is said his decisions led to the creation of the Commercial Court. Yet these two appointments were not alone."[2]

Not alone but, as the Master of the Rolls, Sir Anthony Clarke (as he then was) said in his Address to the Pan-African Legal Conference in Mauritius in September, it is fair to say they were notorious. In 1944 Lord Justice MacKinnon said this:

> "When I was the pupil of T E Scrutton (later Lord Justice Scrutton) from 1896 to 1897, he told me that the Only Begetter of the Commercial Court was 'Long' Lawrence.
>
> Mr Justice J C Lawrence was a stupid man, a very-ill equipped lawyer, and a bad judge. He was not the worst judge I ever appeared before: that distinction I would assign to Mr Justice Ridley. Ridley had much better brains than Lawrence, but he had a perverse instinct for unfairness that Lawrence could never approach."[3]

I am obliged to Lord Clarke for those references, both of which appeared in his address in Mauritius.[4] You see, I am getting the hang of this judging. Why do your own research if the Court of Appeal has done it already?

---

[2] Stevens, *The English Judges: Their Role in the Changing Constitution*, (Hart) (2002) at page15.
[3] MacKinnon, *The Origen of the Commercial Court*, (1944) 60 LQR 324-5.
[4] Lord Clarke, *How Judges Should be Appointed*, Address to the Pan-African Legal Conference, Mauritius, 22 September 2009.

So process, and how we move towards better judicial diversity, is important. But I think it is worthwhile pausing to ask, **why** - why is diversity within the judiciary so important? I do not for a moment suggest that no thought has been given to this question, but I am not convinced that enough thought has been given by enough people. By discussing "why", we may engender more enthusiasm and momentum in the search for an answer to the question: "how?"

Diversity within the judiciary is important for several reasons.

First, it is important that those who are ready, willing and able have equal opportunities to be judges. That is a question of individual rights. It was the initial driver for judicial diversity, and its importance remains undiminished. No quality that makes a good judge has anything to do with gender, or colour, or creed, or origins. I applaud those individuals and organisations that have done so much to ensure that those that seek judicial appointment do so on the basis of a level-playing field. I only deal with it shortly because it is obvious and well-rehearsed.

But to consider that that is the only reason why judicial diversity is important is simplistic.

A second reason - now more frequently cited than it used to be - is that it is important that the judiciary are representative of the population as a whole. However, that as a proposition can easily be misunderstood. Taken to its logical conclusion - or, perhaps, its illogical conclusion - it would require us to have representatives from, for example, the entire spectrum of intellectual ability and judicial aptitude. That cannot be right.

Furthermore, when specific parties bring a case to court, what matters to them is not the make-up of the judiciary as a whole but rather the virtues - and deficiencies - of one judge: namely, the judge who will try their case. Ideally, of course, they want any judge that will, without any doubt, find for them. All parties want that. But, given that is something they cannot have, what they want is a "good" judge, i.e. a judge with the abilities to try their case justly, competently and efficiently. During the period of

their case, they do not care about the judge's background or whether he is representative of a particular part of our community or another. The make-up of the judiciary as a whole is irrelevant to particular parties in a specific case.

Yet, in my view, still it is important that the judiciary are "representative". It is important that the judiciary maintain the confidence of the public: it is just as important as the maintenance of confidence in other two branches of government, the executive and the legislature. Without public confidence, the justice system - an essential component of democratic government - cannot continue to function. It is, therefore, not sufficient for our judiciary to be drawn from a limited group within our society who may well, in individual cases, do justice through applying the law appropriately to properly found facts. The only way of ensuring general public confidence in the judiciary is to ensure that no relevant sector of our society feels excluded.

Let me take an example. When I was Designated Civil Judge for Wales, I was involved in the annual diversity public open days put on by HMCS Wales. All types of judge were involved in the events, and a wide spectrum of the public came to them. The "judges" included magistrates. In South Wales, on a proportionate basis, certain ethnic minorities are over-represented within the magistracy. Those of an Indian ethnic background are an example. There are many excellent magistrates from such a background - incidentally belying any suggestion that the way forward towards diversity is by some judicial quota system for minorities. However, there is a very significant Chinese community in South Wales who are not only unrepresented at any level of the judiciary - including magistrates - but appear to have no interest in it. Such lack of interest can quickly lead to a lack of respect, and to alternative extra-judicial forms, that can have the potential for undermining the rule of law which is a cornerstone of our society. That is what Professor Malleson meant when he referred to the "corrosive effect… too great to ignore" of a failure to achieve judicial diversity.[5] No part of our community should feel excluded from our justice system.

[5] Malleson & Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical perspectives from around the World*, (University of Toronto Press) (2006) at 42.

There is a third reason, why in my view, judicial diversity is important. As Lord Clarke said in his address to which I have already referred:

> "One of the great strengths of the judiciary is the experience that judges bring to their decisions. As a collective body, like the strands that go to make a rope, that judgment is collectively stronger, for being built of diverse strands".[6]

For a number of years, I was the Chief Social Security Commissioner. The Commissioners were judges who heard appeals from Social Security Appeals Tribunals. Traditionally, they were not only white, male, public school, Oxbridge and over sixty - old conventional criteria for judicial appointment - but they were senior barristers from the Chancery Bar, often silks. I have nothing against white males of a certain age at the Chancery Bar. Indeed, undoubtedly they have a great deal to offer the benefits jurisdiction, and other judicial fields which require careful consideration and close analysis of detailed and often incomprehensible legislation. However, such people do not necessarily make the best judges for dealing with, for example, a long list of applications for permission to appeal, which requires a fairly robust approach. In 1986 the first woman Commissioner was appointed. In the same year a solicitor - heaven forbid! - was appointed. Shortly afterwards, a Commissioner in his 30s was appointed. Amongst those who now sit in that jurisdiction there are people from a wide variety of backgrounds, including academics, first tier judges, judges from other jurisdictions, solicitors, those from the Common Law Bar, men, women - and all across a wide age spectrum. In that jurisdiction, I have sat with both Scottish and Northern Ireland judges. Not all of those judges are good at all of the judicial work that comprises the jurisdiction. But, as they have moved into the new Administrative Appeals Chamber of the Upper Tribunal, as a cohort of judiciary they are undoubtedly stronger than any group could be if taken from any narrow band of society.

This factor has become more important as judges are required to do a wider range of work. Not many years ago, High Court judges turned up at the Royal Courts of Justice, or at the Assize Courts outside London, went into court and decided cases at oral hearings. So did less senior judges. In North Wales, the judge used to drive past

[6] Lord Clarke, *ibid*, at para 25. Lord Clarke's address is thought-provoking, and has provoked my thoughts in putting together this paper. I fully acknowledge my debt to him. The address warrants full reading.

the court and, if there were no hearings, the clerk used to stand on the steps and shout, "S'dim gwaith heddiw, farnwr" - "No work today, judge" - and the judge would drive on. The judge kept his fishing rod in the boot.

We still hear cases in court, with oral evidence and oral submissions. But increasingly our work is paper-based. We have written submissions and statements in almost all civil cases, and within five minutes of starting a case, you are ploughing into cross-examination of the claimant. That requires proper preparation and careful consideration of the papers. Furthermore, much of our judicial work is done on paper. 95% of the Social Security Commissioners' work was done on paper without a hearing. As Designated Civil judge for Wales, I had delivered - literally - boxes of box work every day. As a Judge of the Administrative Court, I now have applications for permission to pursue judicial review or reconsiderations of decisions of the Asylum and Immigration Tribunal in the Admin Court, for example - of which there are well over 10,000 applications last year. I did not do them all, although sometimes it felt like it. We have "Section 31s" - paper applications for leave to appeal to the Court of Appeal Criminal Division. Most other applications are now done on paper, at all levels of the judiciary, even if a dissatisfied party often has the right to a reconsideration of the resulting order at an oral hearing.

Furthermore, increasingly judges have to deal with "management", both case management - we have to manage individual cases - and judicial management. Since the Constitutional Reform Act 2005, we also have to manage ourselves - judges have leadership roles in which they have to deal with other judges, staff, estate, budgets and the administration. That sort of work requires different skills from, say, sitting in the Crown Court. A diverse judiciary is better able to cope with that varied workload.

And, some parts of the pool from which judicial appointments can be made are more likely to be able to deal with a wider variety of work. Because of their experience, they are better able to adapt to a greater variety of judicial work. They have a more extensive comfort zone than others.

When these factors are being considered, solicitors should score high. We are not in awe of large amounts of paper. Dealing with paper applications - which is anathema

for some judges - is frankly food and drink to most of us who have been crashing through paperwork for most of our professional lives. In practice, we are involved in both case management and, often, the management of our firms - and the people within them - which well-equips us to deal with management of other judges and with the administration. My predecessor in Wales was a solicitor, HHJ Graham Jones. I have just been sitting in Birmingham, where the Designated Civil Judge (HHJ McKenna) is a solicitor. When the new tribunal system was set up a year ago, the first three chamber presidents (including me) were all solicitors. It should come as no surprise that judicial posts that have particularly heavy administrative responsibilities are often filled by solicitors. The trend is towards more judicial work for which solicitors are particularly well-equipped.

Of course, there are areas where solicitors may generally be weaker candidates. Not all, but many of us - even if we are advocates - spend less time in court than barristers. We may have less experience of evidence and court craft skills. So, for us, flying time - time spent sitting as a part-time judge - may be more important than it is for the Bar. Sitting part-time is vital before anyone is made a full-time judge, so that that individual can be sure that he or she has the aptitude for the job, and will enjoy it. I know how difficult it can be to gat time away from a busy practice to sit, and that is something that Lord Judge referred to in his address on diversity.[7] Can we persuade firms to allow partners and other members to sit as part-time judges, for example as part and parcel of their laudable pro bono activities?

But we have moved away from why, and on to how. That is trespassing on the next session. It is not my job to persuade you each to apply for judicial office. For me and many others it is the best job in the world - at least now that I am too old to be a professional footballer or singer - but it will certainly not suit everyone. What I hope I have done is to explain why, in my view, diversity is vital for the judiciary - and what solicitors (and especially those with experience in advocacy before the higher courts) have to contribute to the judiciary as a whole. Potentially, that contribution is great. As a judicial system we cannot afford to do less than encourage solicitors - and others who may be reticent - to come forward, if they think that sitting as a judge may

[7] Lord Judge, *ibid*, p3.

be something they may wish to do and may have an aptitude for. I hope that, before too long, I shall have a fellow brother (or sister) solicitor judges on the High Court Bench. We can make the judiciary the stronger.

That, I hope, will lead seamlessly into the first substantive session of the conference. I know it was the first session of the day. Those involved in the last session today may have a harder task. But, in the meantime, thank you all for your attention this morning.

Gary Hickinbottom

November 2009