JUST JUDGES?[1]

A Public Lecture by Lady Brenda Hale, The Rt. Honourable, the Baroness Hale of Richmond, DBE, former President of the Supreme Court of the United Kingdom.

Hosted by the Sri Lanka Judges' Institute and the Max Planck Foundation for International Peace and the Rule of Law on 27th August 2025, at the Bandaranaike Memorial International Conference Hall (BMICH).

It is a delight to be here – it has been a dream of mine to visit Sri Lanka ever since my father spent a month here in 1955 and fell in love with the island. He communicated that love to the family, and I have been wanting to come ever since.

The topic today is the independence of the judiciary, but please forgive me for talking mainly about the judiciary of the United Kingdom. That is what I know most about. But I do think that we can learn some important lessons from our experience and that of the whole Anglo-American legal world.

The first is that we have had laws, and judges to administer them, throughout history - long before we had anything like a democracy or even a Constitution. Above the door leading into the Supreme Court of the United Kingdom is a stone carving of King John sealing the Magna Carta in 1215. There is a similar carving

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in bronze on the great doors leading into the Supreme Court of the United States. Magna Carta has an iconic status amongst lawyers on both sides of the Atlantic. It is less well-known that King John repudiated the charter a few weeks later but the following year, after he had died, his infant heir reissued the charter with some amendments. Among the provisions which were not included because they were doubtful and required further study was one of my favourites from the 1215 charter:

> 'We will not appoint Justices Constables Sheriffs or Bailiffs except from such as know the law of the Kingdom and are willing to keep it well.'

Even then, the judges were expected to know the law and to keep it well. This went hand in hand with the most famous chapter which has survived from the 1215 charter into all later versions and is still on the statute book in England and Wales to this day:

> 'No free man shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled or in any other wise destroyed; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man right or justice.'

That last sentence is picked out from the facsimile of the 1225 charter which is engraved in the doors leading into our library at the UK Supreme Court. Its words still have the power to make the blood race, as the great Lord Bingham put it. So the point is that you can have just laws and just judges even before you have a modern democracy with a modern constitution.

But we now know that it is not enough to trust the judges to be just. There need to be safeguards to encourage them to be so. And the greatest of these is their independence. This is a relatively recent development. The Bill of Rights annexed to the Constitution of the United States of America refers to 'due process of law' and to the right to trial by jury, but it does not guarantee the independence of the judiciary. Article 10 of the Universal Declaration of Human Rights of 1948, on the other hand, does insist that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him'. Article 6 of the European Convention on Human Rights is to the same effect. These principles are reflected in the written Constitutions of many States today. The notion of an independent and impartial judiciary flows from the notion of a fair trial or the right to due process.

But what do we mean by an independent and impartial judiciary? At its most basic level, it means that the justice system must be a separate and independent branch of government. It decides disputes between individuals and enterprises; it

enforces the criminal law; and it ensures that the executive branch of government acts within the powers which the law has given it and respects the fundamental rights of everyone within the jurisdiction. In countries with a written constitution it also ensures that Parliament respects the fundamental rights which are guaranteed by the constitution.

To do all this we need decision-makers who are able, in the words of our judicial oath, to 'do right to all manner of people according to the laws and usages of this realm, without fear or favour, affection or ill-will'. This means both impartiality between the parties appearing in court and neutrality as to the result. It means that the judiciary must not be corrupt, either in the narrow sense of taking bribes or in the broader sense of being susceptible to favours or threats. And it means that the judiciary are not the servants of the government. They must be free to decide the case in accordance with the law and not in the way that the government wants. They must not be subject to any overt or covert coercion from government. They must not be under any pressure from politicians of any stripe. I remember people asking me after the prorogation case, 'Did anyone in government ring you up to tell you how they wanted the case decided?' No they didn't! They're not allowed to do that, and it's an important part of our independence that they aren't. If the government wins the case, it must be because it has won the argument.

So how do we secure this sort of independence? At the very least, the judges must not be afraid that they will lose their jobs if they make decisions which are against

the government or even just unpopular, with some politicians, or with the media to which so many politicians are slaves, or with the general public. Until 1701, judges in England and Wales held office during His or Her Majesty's pleasure, so they could be moved or removed at will. It is amazing how bravely some of the 17th century Judges stood up for law and justice against the King. But not all of them did so. And the Act of Settlement of 1701 provided that henceforward they would be appointed 'quamdiu se bene gesserint' – or, as it was put when I was sworn into the office of Lord of Appeal in Ordinary in the House of Lords in 2004, 'so long as she shall well behave herself therein' (which provoked much mirth amongst their lordships). The Act also provided that senior judges could only be removed by an address from both Houses of Parliament to the Crown. These days, less senior judges can be removed by the Lord Chancellor and Secretary of State for Justice but only with the consent of the Lord Chief Justice or the Senior President of Tribunals. In practice there is now a formal disciplinary process leading up to any sort of sanction against a judge who misbehaves. On those very rare occasions when dismissal might be appropriate, as when a judge was caught smuggling alcohol across the English Channel on his yacht, the judge can usually be persuaded to resign. And it is even harder to dispose of a judge who is simply not up to the job. So judges in the UK do have security of tenure in this sense.

But security of tenure is not enough. It is necessary to pay the judges enough, not only to deter them from taking bribes but also to encourage them to work hard enough. This is a sore point in some places in the world where the judges are expected to work very hard but are not paid enough to incentivise them to do so – a recipe for delaying justice. The problem in the UK is rather different. Judicial salaries have to be enough to encourage the best qualified candidates to want the job. They are attractive to people like me, whose previous career was in academia and the public service. But they are not so attractive to the successful advocates who have traditionally been regarded as the best candidates for the best judicial jobs: the better qualified a person may appear to be to become a top judge, the less attractive the salary and other benefits may be to that person. One attraction used to be the judicial pension. Some countries have constitutional guarantees that judicial remuneration cannot be reduced. But without this the UK provided an example of what not to do. The previous government changed the rules of the pension scheme in a way which made it a great deal less attractive, and also affected people who had already accepted appointment on the basis of the former pension scheme. For a while it became extremely difficult to attract high quality candidates for the bench. Fortunately, that problem was resolved, but the episode led to a breakdown of trust between the government and the judiciary which took time to repair.

But there is more to it than security of tenure and adequate remuneration. The courts need to be properly resourced to do their job properly. In England and Wales, the Lord Chancellor and Secretary of State for Justice has to swear an oath 'to discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible' (Constitutional Reform Act 2005, s 17). Yet the UK justice system, especially in England, was cut to the bone during the years of austerity which followed the financial crash of 2008. Courts were closed and their buildings sold off. People outside London and the other big cities often have to travel a very long way to get to court. Many of the courts which remain open are in very poor repair. They are also often under-staffed, without enough ushers, clerks and other administrative back-up, let alone security. Perhaps most serious of all, court sitting days have been artificially rationed, so that a backlog of cases awaiting trial built up even before Covid came along to make it even harder to try them. And things have not improved since normality could be resumed after Covid. We are still experiencing totally unacceptable delays in both the criminal and the family courts.

It has not been all bad news. Money has been spent on computerising some court processes. Court bundles are now digitised and largely accessed on screen. The mounds of paper which used to accompany any substantial case have mostly disappeared. Even here, there have been recent reports that the digitisation has sometimes been faulty and so documents may have gone missing. Covid also

made us realise that court hearings did not always need to be face to face. Every court and tribunal is equipped for remote hearings. But for a while at least cases which really ought to be done face to face were being done remotely and some still are. And nothing was done to make it easier for ordinary litigants, many of whom have limited access to the necessary technology, to take part in remote hearings. It all adds up to a general impression of a justice system which is not taken as seriously as it should be by government. And it leads to the judges feeling powerless to influence how their work is organised.

There are justice systems elsewhere in the world which are entirely run by the judiciary. The government gives them a budget and the court decides how it should be spent and employs the staff to run it. This must give the courts more independence in deciding on priorities – it is perhaps less likely that sitting days would be artificially restricted, for example. It should also make it clear that the staff owe their loyalty to the justice system which employs them, rather than to the government machine. On the other hand, people who are well qualified to be judges are not necessarily well qualified to run a justice system. Most of the senior judges in the UK have never run anything. And there is still no guarantee that the government will allocate sufficient resources for them to do so.

Another crucial ingredient in securing judicial independence is the way in which the judges are appointed. There are many different ways of doing this and I am not going to suggest that ours in the UK is the only or even the best way although

I do think that it is a good system. The prior and fundamental question is how far judicial appointments should be influenced by party political considerations. The answer which most lawyers in the United Kingdom would probably give is 'not at all'. Before the second world war, political considerations certainly played a part in some appointments. It used to be standard practice for the Attorney-General, a Member of Parliament, to be appointed Lord Chief Justice of England and Wales when a vacancy arose. Many of the senior judiciary had been active politicians before their appointment. The judges and the politicians were friends rather than adversaries. The Lord Chancellor of the day, also a politician, played a crucial role in all judicial appointments, making the more junior ones directly and recommending the more senior ones to the Crown.

But it is generally believed that political considerations have not played a significant part in judicial appointments in the UK since the second world war. The Labour government of 1945 to 1951 would have found it hard to appoint many judges who supported the Labour party. Indeed one of their most successful appointments was Lord Reid, a Scotsman who had been a Conservative MP until he was appointed directly to the House of Lords, rather than rising through the judicial ranks in the usual way. I myself owed my first two judicial appointments – as a part time Judge in the Crown and county courts and as a High Court judge – to Conservative Lord Chancellors and my second two – as a Lord Justice of Appeal and as a Lord of Appeal in Ordinary – to Labour Lord Chancellors.

I think that we would all say that we did not know the party politics – if any – of most of our colleagues in the House of Lords and Supreme Court. With one or two one could make a good guess, because of their previous activities, but not with most. Not that party political affiliation necessarily correlates with attitudes to judicial decision-making, especially in cases involving the government. That same Lord Reid who had been a conservative MP was responsible for the most important decisions which led to the expansion of judicial review of administrative action in the 1960s. Scepticism about some governmental action is just as common on the right as it is on the left. Support for some government action is just as common on the left as it is on the right.

Our ignorance of the party politics of judges in the UK is, of course, in strong contrast to the situation in the United States, where everyone knows the political affiliation of the federal judges – because they are nominated by the President, although subject to approval by the Senate. This too can be manipulated for political ends, as we saw when the Senate would not let President Obama nominate a successor to Antonin Scalia in 2015, an election year, but was happy to allow President Trump to nominate a successor to Ruth Bader Ginsburg in 2019, also an election year. The result is a court with six Republican nominees and three Democrats, whose decisions on vital constitutional matters seem mostly to reflect their political affiliations.

Since the 2005 Constitutional Reform Act all judicial appointments in the United Kingdom have been recommended by independent appointing commissions - there is one for each part of the United Kingdom - Scotland, Northern Ireland and England and Wales. An ad hoc Commission is set up each time there is a vacancy in the Supreme Court. This is chaired by the President of the Court, with another senior judge who is not a member of the court and representatives from each of the three commissions, at least two of whom must be non-lawyers. What they do bring is experience of current best practice in recruitment. All the commissions have a duty to make their recommendations solely on merit. They employ open and transparent application-based processes, with published competencies and a variety of methods of assessing these.

I had to apply to become Deputy-President of the Supreme Court, and to become President of the Supreme Court (even though I was the only candidate!) And a hugely elaborate process was gone through. This included an application form, referees, supplying three examples of my written work, and a very tough interview. Then the recommendation was made by the commission, with reasons. So that has been my experience on two occasions. This independent process is much harder – it is very much easier to be tapped on the shoulder than to put yourself forward for an application-based process.

Save in large scale recruitment exercises, they make one recommendation per vacancy. In England and Wales, the Lord Chancellor has three options: ‘yes’,

'no', and 'maybe'. If he does not say yes, he has to give reasons, which runs the risk of judicial review. In practice, he may take some time about it, but he says 'yes'. The scope for introducing party-political considerations is practically nil.

Indeed, there are people who think that we have gone too far in that direction. The Lord Chancellor and Secretary of State for Justice is no longer a senior lawyer and a top-ranking member of the cabinet. He or she need no longer be a lawyer. There are far fewer lawyers in Parliament than once there were. There is less understanding of the justice system and its importance in the whole scheme of government. The judges and the politicians are not the friends they used to be. Would it not be a good idea, say some, if there were more political involvement in appointments, so that the politicians could feel more invested in the system? Some have suggested, for example, that the Commission which recommends appointments to the Supreme Court should put up more than one candidate so that the government has a choice, as I believe is the case, for example, in Canada. But the judges would be vehemently against this – would the politicians' choice be on merit or for other reasons? I got a lot of criticism when I suggested that the Commissions for appointing Supreme Court Justices might be enlarged, from five to seven, by including a senior politician from His Majesty's Government and from His Majesty's loyal Opposition, to provide balanced political input.

The question of political involvement in judicial appointments is particularly sensitive in countries with a written constitution which includes a Bill of Rights

– which is most of the countries of the developed world including Sri Lanka. For then the Supreme Court can override the will of the currently elected legislature. This is not the case in the United Kingdom, where courts have no power to strike down provisions in an Act of the UK Parliament – we do not have a written constitution against which their constitutional validity can be judged. The sovereignty of the UK Parliament means, tritely, that Parliament can make or unmake any law. This means that the currently elected legislature can always overturn a judicial decision which it does not like (although it does not do so often).

In countries with a written constitution, where the top court has the final word, packing the court with political appointments is a way of retaining power even after the politicians have been voted out of the government or legislature. Independence from both is secured at the price of current democratic legitimacy. In some countries in continental Europe, such as Germany, this problem is solved by having a separate Constitutional Court, appointed by members of the legislature in proportion to their proportion of the vote – so they are seen as having greater democratic legitimacy than ordinary judges appointed in the usual way. They then serve for a fixed, non-renewable, term of nine years.

There are no easy answers. But I think that making appointments on obviously party-political grounds is not a guarantee of democratic legitimacy.

Note the insistence in the United Kingdom that appointments must be 'solely on merit'. Of course. But it was only written into the law when the calls for greater diversity in judicial appointments became more vocal at the beginning of this century – as if more diverse candidates were necessarily less meritorious than the 'pale, male and stale' candidates who were traditionally appointed. But there are at least four very good reasons for wanting to have a more diverse judiciary than we used to have.

The first is in fact democratic legitimacy. Our constitution is founded on the rule of law: the idea that society is governed by laws and not by the whim of individuals and that everyone, the governors as well as the governed, is subject to the law. This means that the law must be there to serve every member of society, not just one section of it: the women as well as the men, the ethnic minorities as well as the ethnic majority, the gay as well as the straight, the poor as well as the rich, and so on and so on. Everyone must be able to feel confident that the law is there for them if they need it. Everyone must feel confident that they will get a fair hearing if they come before the courts. This means that our courts, and the lawyers who serve their clients in and out of court, must be as reflective as possible of the society they serve.

The second is closely linked to that. The guiding principles of our law are justice, fairness and equality – getting to the right result, getting to it in a fair way, and treating everyone as equal before the law. Equality before the law reflects the 18th

century enlightenment value ‘that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party are seldom, if ever, acceptable grounds for differences in treatment’, as Lord Hoffmann has put it. Gender was added to that list in the 20th century. In one way or another, that notion of equality is reflected in all the modern human rights instruments and in many written Constitutions. It is also reflected in our domestic law. Those values of justice, fairness and equality ought to be visibly embodied, not only in our laws, but also in the judges who administer them. The visible absence of women, of people from ethnic minorities, of people with disabilities, and of others from under-represented groups - means that they are not.

Third, and leading on from that, there is equality of opportunity. This benefits, not only the individuals concerned, but also society, so that we don’t waste the talents that are available to us. In the UK, we have done quite well in improving the proportion of women in the judiciary. Women are now 44% of all judges – but note that this includes those who used to be called stipendiary magistrates and also tribunal judges, so they might not be regarded as judges in some parts of the world although they do a judging job. Women are less well represented amongst court judges than amongst tribunal judges. They are also less well represented in the High Court, Court of Appeal and Supreme Court than they are in the lower ranks. There are presently two women on the Supreme Court. We have done much

less well in recruiting judges from ethnic minorities. They are now 12% of all judges, an increase from 7% ten years ago. But while the proportion of judges of Asian or mixed-race heritage has risen steadily, the proportion of judges of black African or African-Caribbean heritage has stayed the same – at 1%. This is a serious problem. There are also very few from ethnic minority backgrounds in the higher judiciary. Gender and ethnicity are not, of course, the only dimensions of diversity, and there is still much work to be done in improving the representation of people from less advantaged socio-economic backgrounds.

And is there a fourth reason for improving diversity? Might it actually make for better decision-making? This is controversial. But surely we are all lawyers and judges first and true to our judicial oaths? In most cases, as Mary Jean Coyne, of the Minnesota Supreme Court put it, 'A wise old woman and her wise old man reach the same conclusions.' But the law is not, or at least not always, neutral or clear-cut. Choices have to be made. As Chief Justice Beverley McLachlin of Canada has argued:

> ' . . . jurists are human beings, and, as such, are informed and influenced by their backgrounds, communities, and experiences. For cultural, biological, social and historic reasons, women do have different experiences than men.'

In short: 'We lead women's lives: we have no choice.' Just as a black person leads a black person's life and has no choice – much of our experience is shaped by

how other people behave towards us. And the experience of leading those lives should be just as important in shaping and administering the law as is the experience of leading white men's lives. This is all the more important in a common law legal system, where the principles are deduced from the decided cases, rather than the cases deduced from a codified set of principles, and the law is developed incrementally, building from case to case.

I do believe that the judges in the United Kingdom are fiercely independent and long may it remain so. But politicians sometimes accuse them of being too independent – and not sufficiently democratic. Thus there have been objections to 'unelected judges' subverting the will of the democratically elected politicians who govern us. For example, in 2013 Theresa May, then the Home Secretary, accused the judges who made decisions in immigration cases with which she disagreed as 'subverting democracy'; in 2016, Dominic Raab, then a junior Minister in the Ministry of Justice, described the decision of the High Court in the case of *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), (upheld on appeal to the Supreme Court, [2017] UKSC 5, both reported at [2018] AC 61) as 'An unholy alliance of diehard Remain campaigners, a fund manager and an unelected judiciary' which had 'thwarted the wishes of the British people'. They had, of course, done no such thing – they had simply upheld the constitutional principle that only Parliament can change the law. As leaving the EU would automatically change the law, the

government had to have Parliamentary approval to do so. Worse still, a mass circulation newspaper printed photographs of the three judges in question – the Lord Chief Justice, the Master of the Rolls and a Lord Justice of Appeal – under the banner headline 'Enemies of the People'. And the government minister who had sworn an oath to uphold the independence of the judiciary did not defend them.

As Lord Bingham put it in a very well-known case (*A v Secretary of State for the Home Department* [2004] UKHL 14, [2005] 2 AC 68),

> 'I do not . . . accept the distinction [the Attorney-General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. . . . But the functions of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic'.

Quite so. UK judges may not be elected or accountable to Parliament, but we are an essential element of democratic government and we *are* accountable. Most of our decisions are reached after a public hearing. We must give reasons for our decisions, and these are usually published, even if the hearing has been in private.

And our decisions are subject to the possibility of an appeal to a higher court. Judges are also expected to behave in a way which is worthy of the respect of government, of the litigants and their lawyers, and of the general public. In other words, we have to do our job well. We have to merit our independence.

And in return for our independence, we do have to accept the limits of our role. An important part of that role in a modern democracy, in which the activities of government have expanded way beyond their historic tasks of defending the realm and keeping the peace, is ensuring that ministers, the government and other public authorities act within the limits of the powers granted to them by law and compatibly with fundamental human rights. In ordinary judicial review of administrative action, the judges must not confuse a judgment on the legality of that action and a judgment on its merits – its pros and cons. In human rights cases, the judges have the delicate task of deciding which evaluations should properly be left to government and Parliament and which evaluations are properly within their sphere of competence. This has been one of the biggest challenges for us since the Human Rights Act was introduced.

So what is the moral of all of this? First, we have always needed judges to administer the law, even if they are not institutionally independent of government. But second, in a democracy we need them to be institutionally independent of government because an important part of their role is to defend the rights of the people against the state. And third, we need guarantees of their independence –

such as security of tenure and salary and a merit-based method of appointment which does not take party political considerations into account. But fourth, the judges themselves must have a degree of democratic legitimacy. This is best secured by seeking to appoint a diverse judiciary which is as reflective as possible of the diversity of the population it serves. And finally, judges must be worthy of their independence – as the prophet Micah put it in a passage often read at judges' services 'what doth the law require of thee, but to do justly, and to love mercy, and to walk humbly with thy God'. In other words – be not only a just judge but remember that you are just a judge.

Thank you.