

## **Judicial College – Being a Judge in the Modern World**

### **"Do Judges use Gavel?"**

### **The Modern Judge in Myth and Reality**

### **Lord Carnwath of Notting Hill JSC**

**16 January 2013**

1. The question in my title is one of two posed on the home page of the judiciary website. The other is “Why do people bow when they come into court?” These are offered as tasters to encourage the reader to explore “1,000 years of evolution” and to “find out how our justice system developed”. Presumably they are thought to be the sort of things about judges which interest the public. In case you are curious, the answers are: (i) “Although they often seen in cartoons and TV programmes and mentioned in almost everything else involving judges, the one place you won't see a gavel is in an English or Welsh court”; (ii) “The presence of the Royal Arms explains why lawyers and court officials bow to the judge or magistrates’ bench when they enter the room. They aren't bowing to the judge - they are bowing to the coat of arms, to show respect for the Queen's justice.” Next to these helpful questions, you will find some typical images of judges: a circuit judge in criminal robes – formal wig and gown and red sash, a rear view of assorted judges processing from the Abbey Service in full-bottom wigs and purple gowns.
2. Much more down to earth, and I would hope of more genuine interest, is another section of the web-site, which gives a series of pen-portraits (anonymous but very personal) of what different judges actually do – under the heading “a day in the life of...” The district

judge, for example, tells us that contrary to ordinary perceptions of a judge in a crowded court-room with “clerks and police officers and phalanxes of court staff”, most of the time is spent working alone:

“The same room has to double as chambers for private hearings and a court for public hearings. My only protection is the desk in front of me and a panic button”.

The district judge has a lot of ground to cover: practice and procedure affecting civil disputes (contract, negligence, personal injury, property disputes, civil injunctions etc.), family disputes (divorce, nullity, disputes over children and finances, domestic violence etc), bankruptcy and winding-up, and then:

“Thursdays are usually Possession Day when I will deal with either landlord and tenant claims, both public and private, or mortgage possessions. We tend to deal with local authority and Registered Social Landlord cases in bulk so it is not unusual to find oneself facing a cause list of 60-75 cases on one day.”

Crucial to the job is said to be “people management”:

“Most of the individuals who appear in front of me do not have the benefit of legal representation and they range from one end of the spectrum to the other, from the supremely lucid to the mentally incapable; from the polite to the downright nasty; from the highly clued to the clueless.

With no one else to support me and with minimal protection, I am required to be not just a knowledgeable lawyer but a social worker, psychologist and therapist as well. I will be dealing one-on-one with all strata of society from incredibly diverse

backgrounds with only occasional help from legal representatives.”

This you may think is a commendably frank and realistic picture of what everyday judicial life for many is really like.

3. As significant as the contents of the judiciary web-site is the fact that it exists at all – that there is a website devoted to the judiciary, that it includes not just court judges, but the tribunals judiciary and magistrates, and that it is seen as part of its function to explain to the public what judges do. These are all incidents of a major change, of which the public may be only dimly aware, that has taken place over the last decade in the constitutional position of the judiciary and, with it, in their appreciation of their own role in society.
4. The big changes date from June 2003. I still remember the sense of shock that afternoon when I heard on the BBC news that the government had decided, without any previous discussion to launch constitutional revolution, the most striking feature being the proposed abolition of the historic office of Lord Chancellor, and with it the removal of the present incumbent Lord Irvine. Ten years on we are still working out the consequences of those dramatic events.
5. One of the avowed aims of the changes was to strengthen judicial independence - actual and perceived. At the time I was unconvinced by what seemed a mere pretext for political action. Independence as such, in the sense of freedom from political interference had never been a real issue. There was no practical risk of political interference in judicial decision-making. Nor, at least in the post-war period, had politics been allowed to play any significant role in the appointment of judges. Even before the JAC there was little complaint that

judicial appointments were made other than on merit. If anything, the historic role of the Lord Chancellor as a senior member of government with responsibility for defending and promoting the interests of justice was a source of strength.

6. In retrospect, however, I believe there has been a profound change, but it has been of a rather different and more subtle kind. Institutional independence in itself meant little. But over time it has brought a new sense of collective identity and with it of collective responsibility.
7. The seeds of change were already there. For a growing sense of collective judicial responsibility I would look back to the introduction of the Human Rights Act in 1998. That was a major jurisprudential development which would affect courts and tribunals at all levels. Two years were left before implementation to allow time for preparation. That opportunity was taken. It stimulated an unprecedented collective exercise, led by the judges themselves with the Judicial Studies Board, to prepare for the new challenges. For the first time, judges at all levels, from the House of Lords down, succumbed to a common programme of judicial training. They found themselves not merely sitting together in judicial seminars, but struggling together with the complexities of case-studies under the Convention. Often it was the judges closer to the coal face, from the lower courts and tribunals, who showed a better and more flexible grasp of the conflicting practical and human issues at stake than their appellate colleagues.
8. At about the same time, Sir Andrew Leggatt was preparing his innovative report on the tribunal system - "Tribunals for Users". His

recommendations were underpinned by two simple ideas: first, that tribunals existed for their users, not the other way round; and secondly, that tribunals were, and should be recognised as, an integral part of the independent judicial system. They should be separated from their sponsoring departments and brought within the justice system. They should have “... a collective standing to match that of the Court System and a collective power to fulfil the needs of users in the way that was originally intended”.

9. Since then, ironically and unhappily, the thing which perhaps has done most to give us a sense of collective identity as a judicial family has been the continuing saga of judicial pensions. When I was first appointed as Senior President, and the judges were in negotiations with Lord Falconer, it came I think as a surprise to my senior judicial colleagues to learn that there were many salaried tribunal judges who were affected in exactly the same way as the court judges. By the time of the most recent disputes, the tribunal interest was taken for granted and tribunal judges were strongly represented on the Chancellor’s pensions committee.
10. The legal and structural changes introduced by the CRA 2005 were far-reaching. At the highest level judicial independence was exemplified by the creation of a new Supreme Court to take over the appellate functions of the House of Lords. I was not an enthusiast at the time. Like many others, I found it difficult to see the point of what seemed to be a very expensive way of doing not very much – a change of form, not substance.
11. However, having a little experience of how it looks from the inside, I am now persuaded that I was wrong. The change was well described

by Lord Hope, not initially an advocate of the move, but who became one of the principal architects of the new court. In a lecture given a year after the establishment of the court, he spoke of the sense of empowerment which came from cutting free from the practices and traditions of the House of Lords<sup>1</sup>:

“The most significant force for change, as it has turned out, was the fact that the Supreme Court was released from the many rules and conventions of the House of Lords and the justices were free to develop new rules and conventions for themselves. The rules and conventions of the House always carefully observed by the Clerk to the Judicial Office gave dignity to the proceedings. They also gave rise to something that characterises any society whose traditions depend on ceremony and the ever watchful eye of officials who have been trained to ensure that they are adhered to – the feeling that because everything has always been done that way, it must be right...

We may have lost some of the pomp and circumstance of the old location but we have gained much in terms of the convenience of the public and the lawyers who work in our Court, and have been able to devise rules for ourselves which suit the purpose of doing justice as an independent function rather than as part of an essentially legislative organisation...

In the House of Lords it was the Law Lords who came first. Everyone else was there one felt on sufferance. In the Supreme Court the reverse is true. Democracy has taken over. Access to

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<sup>1</sup> Lord Hope *Do we really need a Supreme Court?* Newcastle Law School 25.11.10.

the building is very simple. The public are made to feel that they are welcome and – as it is a public building – to appreciate that in that sense it is their court...”

12. Some may feel that we have a little way to go to achieve complete user-friendliness. I have every confidence that under our new President, Lord Neuberger, more changes will come. However, as a member of the court I am now much more aware than I was of the sheer volume of work, energy, and imagination, required from both the justices and administrative staff, simply to create the new court and its processes.
13. At the lower levels, the sense of empowerment has come, not so much from breaking free, as from coming together, under strengthened and unified judicial leadership.
14. The CRA established the Lord Chief Justice in England and Wales as President of the Courts and Head of the Judiciary (s 7). Neither of these concepts was very fully worked out in the statute. His duties as President were to represent the views of the judiciary to Parliament and government, to maintain appropriate arrangements for their welfare, training and guidance, and for their deployment and the allocation of work within the courts. The Lord Chancellor's office was retained but without any leadership role in relation to judges. He acquired a new statutory duty to uphold judicial independence (CRA s 3), and retained his responsibility for administration – the duty to ensure “an efficient and effective system” to support the carrying on of the business of the courts (Courts Act 2003 s 1). Appointment of judges was entrusted to a new judicial appointments commission, and discipline to a new office for judicial complaints.

15. These changes were complemented two years later by the even more striking changes to the tribunals system. In line with Leggatt's proposals they were reformed into a unified two-tier system, divided into chambers representing different specialisations, each led by a chamber president. Their members were given the same status as court judges, and they were required to take the judicial oath (a major logistical exercise, involving more than 6,000 tribunal judges and members). They were protected by the same guarantee of judicial independence as their court colleagues. Overall leadership was entrusted to a Senior President of Tribunals (TCEA s 2). The Lord Chancellor was again given the duty to ensure an efficient and effective system to support the tribunals.
  
16. The office of Senior President was an interesting constitutional creation. It was entirely new autonomous office, not subject to direction from the LCJ, the Lord Chancellor, or anyone else. Its functions were modelled on those of the Lord Chief Justice, including responsibility for welfare, training and guidance. But there was more. The Senior President was required by statute to have regard to defined objectives: the need for tribunals to be “accessible”, for proceedings before them to be “fair and to be handled quickly and efficiently”, and the need for members of tribunals to be experts in the subject-matter or law of the cases before them. The Explanatory Notes to the Bill said that these criteria were intended simply to reflect “the long-standing principles underlying the jurisdiction of tribunals”, as recognized since the 1957 Franks report. (No great surprises there, although one would like to think that accessibility, fairness and efficiency are not peculiar to tribunals.)



17. But then there was something much more radical. The Senior President was required to have regard to “the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals”. This was a new one. I have no idea where it came from. It was not in the Bill as originally published, I believe it was unprecedented. As far as I know, the Senior President of Tribunals is the only judicial officer – possibly anywhere in the world – with an express duty to innovate. Note: not just the desirability of thinking about innovation, but the *need* to do it.
18. An important feature of the new scheme was flexibility of deployment - the ability to assign tribunal judges and members from one chamber to chamber to another, subject to ensuring the necessary expertise and training. This had been very valuable in enabling the service to meet fluctuating demands in the different jurisdictions without extra recruitment. For example, it enabled us to create a completely new environmental jurisdiction from scratch to deal with demands in that field expected to arise from new regulatory legislation, but at a time when we had no real idea what the scale of the demand would be. We were able to assemble an impressive panel of judges and specialist members, simply by inviting applications from those with established expertise within our existing 6,000 members.
19. Another important development was the designation of court judges at all levels up to the Court of Appeal, as *ex officio* tribunal judges, able to sit by request of the Senior President. This has led for example to High Court judges (from throughout the UK) sitting regularly in the Upper Tribunal on immigration cases. The powers of the LCJ and Senior President in relation to deployment and cross-

assignment of judges both within and between the courts and tribunals will be extended significantly if and when the Crime and Courts Bill becomes law.

20. I give one perhaps unusual illustration of what this can mean in practice. I was sitting in the Court of Appeal in an immigration case, which raised a significant issue of European law. It was clear to us that the issue needed wider investigation than had been given so far by the Upper Tribunal. I gave the leading judgment, setting aside their decision and remitting the case to the Upper Tribunal, inviting the parties to submit further evidence on practice in other European countries. I did not want to leave it there. Putting on my hat as Senior President, I was able to request myself to sit in the Upper Tribunal on the remitted appeal, which I heard with two senior immigration judges. Although this course was perhaps unconventional, no-one could say it was inconsistent with my duty to innovate. It seemed to me to give us the best of all worlds: the specialist expertise of the senior tribunal judges, combined with broader legal perspective and perhaps the added clout of a Court of Appeal judge. Happily our judgment was subsequently upheld by other colleagues in the Court of Appeal.
21. The new judicial leadership structure for both courts and tribunals was reflected in strong roles for the Judicial Executive Board, and the Tribunal Judges Executive Board, which brought together the senior judicial leadership in each body to take a central role in policy decisions. The Senior President provides the link by sitting on both. At the same time the Judges Council was reshaped to include representatives from all levels including tribunals and magistrates, thus giving a better collective voice across the judicial community.

22. The 2005 Act made a reasonably effective job of dividing up the various functions which had formerly been exercised by the Lord Chancellor. But it said little about how they were to be made to work together, or who was to have overall responsibility for developing them as an integrated system for benefit of the users. To take an obvious example, it makes no sense for judicial leaders to talk about planning for improvements in judicial performance, without relating them to infrastructure, buildings, IT services, and support staff, responsibility for which rests with the Lord Chancellor.
23. For the courts this separation of responsibility as between judges and administrators was reinforced by the establishment of the LCJ's judicial office as a separate organization from HM Court Service, each with its own Chief Executive. Although there was a Court Service Management Board, on which judges were represented, under an independent chairman, its authority and reporting lines, and its relationship to the LCJ and the Lord Chancellor, were somewhat obscure.
24. Personally I was happier with the tribunal model of a single organization for judges and administrators. This had been the tradition in the constituent tribunals, and we saw no reason to change it. Perhaps because a much larger proportion of tribunal judges came from a solicitor background (over 65%), judicial leaders seemed more ready to treat the task of administration, and working closely with the administrative staff, as an ordinary part of their job. In agreement with our first Chief Executive, Peter Handcock, I decided that we would carry the single organisation model into the new tribunal structure. As I explained in an early note to the senior judges, while my general position was that "judges should judge and

administrators should administer”, the boundaries were blurred, and the only real answer was a partnership between them.

25. Things have moved on since then. The more that tribunals and their judges were assimilated to their court counterparts, the less easy it became to defend the logic of a tribunal administration completely separate from that of the courts. Financial stringency also played its part. In early 2010 the government decided to bring the two together in a combined HM Courts and Tribunals Service. This had the inevitable consequence that the office of the Senior President had to be separated from the rest of the tribunals administration, and assimilated in practice to that of the Lord Chief Justice, although formally distinct as the statute required. My initial misgivings were much allayed by the appointment of my first Chief Executive Peter Handcock, as Chief Executive of the combined service. Equally important was the creation of a new Courts and Tribunals Board, under a strong independent chairman, and with equal representation of judges and senior administrators. The first Chairman Bob Ayling rightly insisted on clear authority from the LCJ and the Lord Chancellor before he would accept the post. It is too early to judge the success of this model, but from my early experience as a member of the Board (before I moved to the Supreme Court) I am very optimistic.
26. The assimilation of the offices of the LCJ and the Senior President has had other positive consequences. One of course was the creation of the Judicial College which offers great opportunities by combining the educational experience and the financial resources of the two constituent bodies. Another was the establishment of a much stronger and professional human resources team within the judicial

office, whose work includes fulfilling the statutory welfare responsibilities of the LCJ and Senior President. There are many areas in which the functions of court and tribunal judges overlap, and it makes sense to provide joint services. I was in the end fully persuaded of the merits of combining our forces and resources.

27. Going back to the tribunal reform project, I would emphasise that it was judge-led from the outset. We were helped by the enthusiastic support of successive Lord Chancellors, and generally the lack of any serious political controversy. It started with the initial report of Sir Andrew Leggatt, and the government White Paper which revealed the strong influence of Lord Justice Henry Brooke as judge in charge of modernization. After my appointment, I established a series of working groups led by senior tribunal judges, working closely with the MoJ officials, to develop the statutory framework in the Bill, and then when it was enacted to fill in the details of the new structure. I find it hard to think of any feature of the final package which did not accord with judicial thinking (except possibly the separation of the War Pensions jurisdiction as a separate chamber, resulting from a late rebellion by some military leaders in the House of Lords. Even that, I think in retrospect, worked out for the best).
28. The sense of partnership between judges and administrators was important in helping to give a sense of cohesion and shared purpose to the new organisation. Not everyone had been convinced of the merits of bringing such an apparently disparate collection of jurisdictions into a single organisation. But as Leggatt had envisaged, it brought collective strength and a sense of common purpose to our dealings both with the courts and with the MoJ and other government

departments, and a shared determination to work together for the improvement of the service for our users.

29. The Chambers Structure has proved very effective, and could perhaps be replicated elsewhere in the judicial system. It gave the Chamber Presidents the power and authority to look in detail at the workings of their different jurisdictions, and to develop innovative ways of improving things. You can see plenty of examples in the Senior President's annual reports. Although issued in my name, these were largely compilations of reports from the Chamber Presidents. This was not just laziness on my part. I was keen that the Chamber Presidents should take responsibility, and credit, for what they had achieved. It has also resulted in a valuable and personal historic record of how much has been done to strengthen and reform the different sections of the new tribunal system.
  
30. Let me take two examples. An obvious priority for action was the mental health appeal tribunal, now part of the Health, Education, and Social Care Chamber (HESC). It had been inherited from the Department of Health in a depressingly dysfunctional condition, evidenced by the regularity and volume of complaints to the Council on Tribunals. The client base was unusual - some of the most vulnerable people in society, but also some of the most dangerous. Unusual also was the need to bring the tribunal to the appellants, rather than the other way round. On the plus side were a very strong force of part-time judges and specialist members; and the availability of legal aid, and in consequence a small body of experienced and dedicated professional representatives.

31. What was needed was much better organisation and leadership on both judicial and administrative sides. Both were quickly addressed, and the service has I believe been transformed. The ineffective and demoralised London-based administration was replaced in Leicester, where there was already a highly skilled and much more stable team of administrative staff dealing with a number of other tribunal jurisdictions. On the judicial side, the new Chamber President, Phillip Sycamore, identified the need for a core team of full-time specialist judges, to work with the administrators to improve direction, efficiency and case-management. This was not to diminish the importance of the part-timers, but to provide better co-ordination. The economic case was made to the Lord Chancellor, and with the active co-operation of the Judicial Appointments Commission a core group of salaried judges has been appointed, all of very high quality.
32. A duty-judge scheme was also introduced whereby salaried judges would base themselves of two to three days a week with the administration in Leicester. As Phillip says in the 2011 annual report: “Duty judges deal more swiftly and efficiently with queries and case manage in situ with listing and booking teams.... Another benefit... is the training opportunity provided to administrative staff as the duty judge is on hand to explain queries leading to a broader understanding of the work of the tribunal...”
33. There was a quite different challenge in another part of the tribunal system, again serving clients from the most vulnerable and needy sections of society. These were the former social security tribunals, now incorporated into the new Social Entitlement Chamber of the First-tier tribunal. In numbers of cases it is one the most important parts of the justice system, handling several hundred thousand cases

a year, nearly all small in monetary terms, but of critical and often urgent importance to the appellants. Unlike the mental health jurisdictions, legal representation is the exception. The challenge for the judges and specialist members is very great. They need to be on top of some fairly complex regulations, and, to get through the numbers, cases must be dealt with quickly and economically, but fairly and sympathetically.

34. Shortly after the establishment of the new Chamber, the new Chamber President Robert Martin was faced with an unprecedented rise in the volume of projected appeals - from 240,000 in 2008-9 to over 400,000 in 2010-11, and increasing thereafter. This was largely attributable to legislative change, notably the introduction of ESA (Employment and Support Allowance) to replace incapacity benefit, leading to the need for many redeterminations and many more appeals.
35. In this case our most important client, apart from the individual claimants was the Department of Work and Pensions. We needed their active co-operation not only to make reliable estimates of the likely demand, but if possible to stem the flow. Accurate projections were vital for recruitment. We needed to work with the JAC to expand rapidly our force of judges and specialist members, particularly doctors, and to train them. As Robert explains in the 2012 annual report, the combined strategy of expanding judicial capacity, and improving productivity, has enabled the Chamber to increase its disposals from 245,000 in 2008-9 to a projected 460,000 in 2011-12. I would be surprised if there is any other part of the judicial system (here or indeed anywhere in the world) which has



coped so successfully with expanding demand of this scale, without loss of judicial quality.

36. At the other end, to encourage better decision-making and reconsideration with the Department, and so diminish the flow of appeals, the Chamber President with my agreement was instrumental in helping to set up a working group, including representatives of the Department, the Tribunals Service and the judges. Some thought that the direct involvement of judges in an exercise of this kind might compromise judicial independence. To me it was common sense. We could not sit back and let ourselves be engulfed in the flood, while our claimants were left to struggle without rights or redress. In response the DWP started a number of programmes designed to improve decision-making, including a “super-reconsideration” initiative which led to some 7,000 cases under appeal being revised in the appellant’s favour without the need for a hearing.

### *Conclusion*

37. You may think I have gone on too long about tribunals. But the challenges are essentially the same in all parts, and at all levels, of the judicial system. Institutional independence has given us both the freedom and the responsibility to rethink our own roles as judges, and the way we are serving the public. It is no longer enough for us simply to sit back and decide cases that are put in front of us by the administration. We are providing a varied service for a varied market. It is for us as judges to identify the needs of that market and to work with the administrators to ensure that our service meets those needs, and to make sure that the public understand what we are doing.

38. Let me end by a reference to another important section of the civil judiciary catering for a very different market - those now accommodated in the ultra-modern Rolls Building. In October 2011 Mr Justice Vos gave a characteristically powerful lecture under the title “The Role of UK Judges in the Success of UK plc”. His theme was the vital importance to the commercial success and standing of this country, nationally and internationally, of the quality of our justice system, and the central role of the judges in protecting and improving it. As he put it:

“Judges are not— contrary to popular belief -just lawyers that are past their sell by date. I like to think they hold, not only an extremely privileged, but also an extremely important, position as the guardians of our legal system. It is the judges’ responsibility to ensure that our legal system is fit-for-purpose... The judges have significant influence on the regulation of both lawyers and other professionals. They can do much to make and keep the legal system the envy of the world.”

39. I would like to think that our legal system can be the envy of the world at all levels – not just in the way it deals with Russian billionaires, but in the way it deals with all sections of the community. It is our job as modern judges to make sure that happens.

RC 16.1.13