



JUDICIARY OF
ENGLAND AND WALES

DAME ANNE RAFFERTY DBE
ROYAL SOCIETY DIVERSITY CONFERENCE
1 NOVEMBER 2018

Lord Hoffmann, then a Law Lord, once described the historic picture of the judge as ‘*old, white, male, geezers*’^[1] sitting passively in court, adjudicating as does a cricket umpire. Given that I’m the first two of those, old and white, it is a particular privilege to be with you today.

That stereotypic picture might suggest leadership is the last thing on the judicial mind. But if Lord Hoffmann casts his eye over judicial diversity statistics he’ll find that whilst there is still progress to be made, he can cheer up. And any disgruntled geezer rump will find there’s only one way this line on the graph is going.

A few examples: Of eleven Old Bailey judges, five are female, the highest number ever to sit there. A quarter of UK Supreme Court justices is female, including its President; just under a quarter of Court of Appeal and High Court judges is female; of the recent High Court appointments, five – 50% - is female, two are solicitors; the Senior and the deputy Senior Presiding Judges, the Vice-President of the Queen’s Bench Division, the Vice-President of Court of Appeal Criminal Division and until recently the Vice-President of its Civil Division, and – if I can skate over it modestly– the Chairman of the Judicial College and Vice Chairman of the Judicial Appointments Commission are female. 41% of Upper Tribunal judges is female; half of all judges under 50 is female. 8% of judges identified as black and minority ethnic, including the Lord Justice who is President of the Investigatory Powers Tribunal. In 2017–18, across all judicial appointments, 62% went to a state school, 56% were the first in the family to go to university.

Not the picture which might immediately spring to mind. And certainly not the picture when I came to the Bar in 1974 or even when I was appointed to the Bench eighteen years ago.

A brief tour of my route here. I come from a family littered with headteachers and entirely free of lawyers. My grammar school obliged its gels –white gloves in summer, black mark if the hood of one’s gaberdine were not buttoned up when at rest – to choose between attic Greek and geography. The latter and I parted when we were still colouring the coastline blue. I thus have little grasp of where anything is, worldwide. My mother – headmistress, remember – once said “I can sum up Anne’s education for you. If you ask her all she knows about the Dodecanese Islands she will immediately tell you there are twelve of them. But she won’t know where they are”.

Going into the Sixth Form I’d to choose between arts and sciences and the Headteachers opined that my arts were a little stronger than my sciences so that whilst reading medicine or law was a choice open to me, I might like to choose law. So I did.

Then there was the professional election, solicitor or barrister. The Heads had by now drilled down into the subject and had Views. I’d probably do less badly as a specialist, they analysed, and perhaps I’d like to think about the Bar. So I did.

Gray’s Inn sorted out pupillage in a set of chambers which did exclusively crime. Our autocratic Head of Chambers offered me a tenancy before I’d even finished pupillage. So I

accepted it. After sixteen years in practice, in 1990 some people said I should apply for Silk, the rank of Queen's Counsel. So I did.

I'd been Secretary of the Criminal Bar Association – someone had said I should be – where I wrote the Minutes in fountain pen and posted them to committee members. I did by hand the invitations to and the table plan for the annual dinner, I made the sandwiches for the annual Conference. During my time in Silk someone said I should become Vice Chairman then Chairman. So I did. I went on the wireless and the television to explain the difference between a judge and a jury, wrote the odd paper on matters of legal principle, and got very tired.

In 2000 someone said I should go onto the High Court Bench. It was the Lord Chancellor. So I did. In 2003 someone said I should become a Presiding Judge. It was the Lord Chief Justice. So I did. In 2011 someone said I should go to the Court of Appeal. That too was the Lord Chief Justice. So I did. Someone said, in 2014, that I'd enjoy the Criminal Procedure Rule Committee. I sense some of you one step ahead of me now. A precis of the balance of my career will read: and so forth and so on.

The time I've had on the Bench has been a privilege it's beyond me to describe. Not only have I had all these opportunities, I've had even more variety when, several times, I've been given an ad hoc task.

For the vast majority of my professional life, including on appointment to the High Court, I was young in the position. Particularly going into Silk aged 39 in crime, meant that I was usually leading someone older than I and senior to me and with very few exceptions male.

I thought and still think that part of how one deals with a level of discomfort depends on personality type and background and cast of mind. I was regularly patronised. I dealt with it by turning it to my advantage. I can see now that if I'd had to explain it I'd have said that if my opponent or the judge is patting me on the head and speaking to me as though I'm still 13 and lucky to be in their presence, then an amount of their energy is dissipated, in that self-indulgent waste of time. I on the other hand concentrated exclusively on the case, and let them get on with it. The longer the better. At the time I would have described those as handling strategies. I would now describe them as leadership skills, one of which is a strategy for handling.

I sat in on an interview for a judicial appointment in which the candidate explained how to leave a difficult meeting, as one of a cohort of several, having individually achieved quite a lot against the odds. Answer: by remaining completely silent for as long as possible. This allowed assessment of both sides of the table, of how the dynamics were working and changing, and it gradually concentrated attention on the candidate who remained mysterious for the vast proportion of the time. And secured considerable concessions and left with reputation significantly enhanced. Now there's leadership. I was reading the territory in 1990 onwards and in 2018 similar territory is still here to be read. As she did. And she got the judicial appointment.

There were two parts to the Hoffman judicial stereotype. The geezers would easily recognise the second, the classic picture of the passive judge. It suggests we just do the work in court. And that work is little more than ensuring parties play by the rules, then giving judgment or imposing sentence. It presents little scope for visualising judges as leaders.

Whilst the image might once have been accurate, or perhaps less inaccurate than now it is, (and you thought scientists and medics were careful with words), we now provide leadership in a raft of ways. First, the day job. We have wide-ranging responsibilities actively to manage cases from issue of proceedings to trial and judgment or sentence. No longer the passive judge, we are far more active in intervention during the proceedings, to ensure for instance that

parties identify the real issues and the costs of litigation, think about appropriate steps to settle claims, and keep trials to a sensible fair length.

Day job is a misnomer. Our time in court is best seen as the tip of the iceberg, the public-facing presentational part, the robed figure such a predictable televisual trope. [I don't actually know what a trope is. I thought it went on the end of helio to make a colour, but I'm pretty sure it's a smart word so I thought the Royal Society was my chance] Judges now do far more than manage and try cases. The 2005 constitutional reforms, which saw the Lord Chancellor's role as head of the judiciary transferred to the Lord Chief Justice, mean he now has so many duties in the running of the justice system that one person cannot do them. Some are done on his behalf by a large number of what are called 'leadership judges'.

Another snapshot using examples: those judges lead the current courts and tribunals reform programme; and, with the Lord Chancellor, run Her Majesty's Courts and Tribunals Service. They are responsible for judicial training – to build the judiciary of tomorrow. They work up guidance on a wide range of subjects: data protection law, how we engage with Parliament and with government, judicial ethics. The list is really long.

A lot of people see one of the Lord Chief's most important leadership responsibilities as to encourage diversity in the judiciary. Parliament certainly does, because it became a formal duty in an Act of Parliament in 2013. [3] But previous Lords Chief and the senior judiciary had for some time before then been shaping and advocating and moving the topic up the agenda.

That statutory duty was a clear signal of the importance government, Parliament and the judiciary attach to the task. To maintain public confidence in the judiciary. To ensure our decisions – vital in a common law country – are centred in the wisdom of a widely defined society. To ensure everyone sees that justice is not visited upon him or her but is a noble virtue in which we all have a stake and should all play a part. We were and are proud of the work done before that statute was enacted – and it has continued unabated. Leadership in this area needs to be underscored by a clear strong unwavering public commitment of support.

Statements of support are important [4] but they cannot stand on their own or they are at risk of Death by Profound Statement Politely Ignored. They must be translated into deeds. We do that in many ways.

Most obviously, leadership judges can be role models. They show how the judiciary is an inclusive and institution. They show the child in school, the undergraduate and the apprentice, that they can become President of the Supreme Court, a Lord or Lady Justice of Appeal, a High Court, Circuit, District or tribunals judge. That our judiciary welcomes everyone with the ability and the resilience and the staying power – and the profound sense of public duty.

Leadership judges also set the tone in terms of the working environment. It is one thing to ensure that entry to a profession is open to everyone, to encourage diversity. It is another to maintain it as the ladder is ascended. That retention is one of the great difficulties the legal profession still has. The number of female partners in solicitors' firms, for instance, remains stubbornly low.[5] That is a particular concern as we chip away at the perception that for senior judicial posts "*only barristers need apply*". Leadership requires us to protect the profession from losing the individual who could thrive in it and become a leader for the future. It obliges us to ask ourselves some tough questions.

I like tough questions (remember the family background?). I am the Chancellor of the University of Sheffield – probably an innocent mistake on its part which it is too graceful to unpick - and from the first speech I made, that on my 2015 installation, I said and I keep repeating that as an undergraduate the most important lesson it taught me was the power of a monosyllable: why? *Why do we do it this way? Why do we do it at all? Why is your*

proposition tenable? Don't concentrate too hard on this bit. I can do without 200 evaluation forms reading "Why her?"

It's nearly 2019 and we need to understand that "*exclusive*" must apply to the judiciary only as a mark of merited distinction. We are an exclusive group of high achieving individuals whose sum is greater than its parts. We cannot afford, nor do we wish to be, exclusive if that adjective describes a group which, intentionally or unintentionally, shuts out the talented individual poised to add richness to our metaphoric fabric. How to remodel working practices to leave no one behind or feeling there is no option but to leave is a work in progress and one we attack with vigour. We need to examine perspectives so long our companions that we simply accept them: judges can only be appointed full-time; only a barrister could become a judge.....But the siren call of tradition - this is how we do things - is powerful. It often earned its power on its merits and those merits might still prevail. What it isn't or at least shouldn't be is, without more, justification for rejection of proposals for change.

If leadership calls for any two particular qualities in our profession they are resilience and persistence. Persistence to persuade. And continue to persuade. To challenge, and bring people with you, to build support from as many sources as possible, some of them unexpected. Resilience because leadership is not a primrose path. If leadership simply involved taking the obvious decision at the obvious time for the obvious reasons everyone could do it. What it requires is the ability to see that a decision is going to be controversial, unpopular, treading new ground, a reversal of what has gone before, and to resolve to justify it and have the guts to say "*We've analysed it, together, and I've listened. And this is what we're going to do.*"

One thing I suspect we tend to forget in this modern age of the politics of conciliation is that if you're leading from the front you've got your back turned, that's where knives land and you can't see them coming. As a presiding judge I had to move an individual from one place of work to another after a spectacular mistake - let's call it mistake - compounded by inadequacies in senior people engaged in so-called management (I had a different noun for it) and the episode was heading for ordeal by tabloid. It involved two valuable lessons about leadership: at local level there wasn't any, and mine was an exercise in just the resilience I've been talking about. The attritional attacks on my approach took some withstanding. My refusal to sacrifice a just result on the altar of process was challenged, and I got a crick in the neck from constantly glancing behind me.

Change can very rarely be effected by an organisation on its own. Increasing judicial diversity is no different. This has meant working with schools [6] (something the current Lord Chief is keen to promote), with the government, the legal profession, the legal regulatory bodies, putting in place mentoring, advice and support to help educate and prepare judges of the future - anything we can think of to improve the chances of a wide pool from which we can appoint.

Leadership also calls on us to be self-analytical and open to criticism. Leaders do not always get it right. They might assume an approach which works in one area will work in another - one size fits all. It might. It might not. "*Did that work well?*" is the less useful question, "*How could that have worked better?*" the more useful. And it could always have worked better. I have yet to shake hands with perfection.

Effecting change takes time. There is no guarantee the measures you adopt will be the right ones. Evaluation of our judicial work shadowing and mentoring scheme showed we were not getting things quite right. As before we take nothing on trust, so the changes will be monitored and we'll re-shape if necessary. Judges have to be sure of themselves when weighing evidence, assessing witness credibility, deciding cases. When leading reform, when leading in any area, we can't risk being too sure of ourselves. Certain but not too certain. We need the courage to

be wrong. To expect the odd flop or even disaster. There's one approach to those: never waste a good crisis.

I explained the unchanging motif of falling in with a suggestion which runs through my life. I wanted, as you realised, to poke fun at myself. But we can take something more serious from it. At first sight it's all about unquestioning obedience. At second sight it's heaving with examples of leadership. The headteachers who knew the girl, the colleagues who assessed the young barrister. The senior judges who saw something in the new judge. And more recently in the not so new. Throughout that account, whimsically engaging (I hope) the leaders saw future leadership coming along, or that it had arrived. That's a feature of the big success stories in judicial leadership: show it, see it, and promote it.

The days of unquestioning deference are, in our society, long gone. Deference endures, but it has to be earned. I've been called most things in my time. Your Honour- wrong - Your Lordship - wrong- Your Highness - wrong - Your Eminence – wrong, but there's a career path no one has yet suggested to me: Pope. Madam – wrong, but with slightly different career possibilities. But by far my favourite was when sitting as a High Court judge in Leeds. A lorry driver was called by the Crown. He manoeuvred his not inconsiderable bulk into the witness box, hitched up one shoulder of his granddad vest, had a comforting scratch of one of his tattoos, and repeated the oath after the usher. I said to him, with not a hint of pomposity, "Do sit down". He glanced at me and said "Thanks chuck".

I expect some of you were surprised that I didn't begin by defining our terms. There's little a lawyer likes more than a definition. I waited until now because I would like to leave you with something to think about. Accurate synonyms for diversity are conveying contrariety, contradiction, disagreement, difference, an unique feature, oddness.

I could gather a group which supplied all those. Disagreeing with one another, each bringing an unique feature, odd, contrary, contradictory of a proposition and of one another. And I could do that by populating my group exclusively with public school educated white male Oxbridge graduates. It would be diverse as defined.

It's not how diversity is deployed as a noun nowadays. I expect most of you would define it as importing backgrounds which are different, contrary views founded in life experiences poles apart. That kind of thing. And I think harnessing desirable wisdom derived from a wide society, something I earlier mentioned, comes from finding then appointing the powerful intellect plus the gritty determination plus the commitment to community plus the education plus perhaps the absence of unearned privilege. I think that is better described as achieved by social mobility.

I wonder if we aren't talking about two stages: social mobility can give us diversity as today we would define it. If that be right, then on one view fire power is productively concentrated on the former. There is good reason for the Lord Chief Justice's approbation of the Kalisher Trust, set up in memory of Michael Kalisher QC. It understands the power of advocacy, defined widely as well as professionally, to change lives and society. It will support the youngster who wants to practise at the criminal bar and hasn't the resource, financial, familial or educational; in state secondary schools it will show students the huge benefits of advocacy skills - good reasoning and analysis, clear articulation of an argument, dispassionate presentation – these all help get better jobs, exam results, apprenticeships and university places. Confidence soars. Without them, people are disadvantaged. With them everyone benefits – not just future lawyers, but engineers, medics, beauticians, scientists, lorry drivers, bank clerks, musicians, bricklayers.

But the Lord Chief knows Kalisher begins its interest earlier. Its two DVDs, *The Trial of Mr Bear*, and *The Trial of Goldilocks*, performed by lawyers (I was cast as Judge Grumpy –

deeply hurtful) translate the familiar stories into really sophisticated considerations of morality, justice, fairness, evidence, and social pressures, and the observing audience at the end returns its verdict, just as would a jury, in a structured discussion with their teacher. The audience is aged seven, in primary schools. That's where the leaders of tomorrow are. Questioning, fearless, engaged, open-minded. There are not only your jurors of the future but your leadership judges. One seven year old will be Lord Chief Justice.

That's why I've planted the discussion seed. What is the productive area in which to concentrate? And what's the accurate title for activity which reflects society's concerns?

I'm so grateful to the Royal Society for the privilege of today. Working with the Society has proved one of life's great joys and I wouldn't miss it for the world. I thus need to demonstrate an ability to do very basic sums: count up to 30. Minutes. Then shut up. I also want to avoid any of you remembering the Alan Bennett lines:

*When you die, mother, do you want to be buried or cremated?
Ooh I don't know luv. Surprise me.*

For those of you who have been, thank you for listening.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.

[1] P. Darbyshire, *Darbyshire on the English Legal System*, (Sweet & Maxwell) (2008) at 399, 'PD (Penny Darbyshire) 'Are you at the Bar, then?

LH (Lord Hoffmann) 'No, I'm a Law Lord'

PD 'Ooh, sorry!!'

LH 'That's OK. I'm one of the old, white, male geezers.'

[2] See <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2018/>>.

[3] Crime and Courts Act 2013, schedule 13, part 2, para.11, inserting a new section 137A into the Constitutional Reform Act 2005.

[4] Also see <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/message-from-lcj-judicial-diversity/>>

[5] For the latest figures see, <<https://www.lawsociety.org.uk/support-services/research-trends/annual-statistics-report-2017/>>

[6] See <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/diversity/schools-engagement/>>.

[7] See Judicial Diversity Report on Progress and Action Plan 2017 – 2018 at 10 <<https://www.judiciary.uk/wp-content/uploads/2018/06/judicial-diversity-committee-of-the-judges-council-annual-report-2018.pdf>>.

