

# Sweet & Maxwell Judicial Review Conference



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## **Speech by Baroness Prashar Chairman of the Judicial Appointments Commission 21 November 2008**

Thank you for inviting me to speak here this afternoon.

I know that the after lunch session is not easy, but if you are interested in judicial appointment and the independence of the judiciary I would urge you to stay awake!

Phrases such as “an end to 700 years of history” and “a gigantic step forward in our constitutional arrangements” were used to describe the changes brought about by the Constitutional Reform Act 2005 - the most significant changes to our constitution since the Magna Carta.

The Act reformed the office of the Lord Chancellor. The Lord Chancellor now has a unique mandate, transcending politics, to protect the independence of the judiciary.

The Act established the Lord Chief Justice as the head of the judiciary. It provided for the creation of a new Supreme Court. It established an independent Judicial Appointments Commission.

This “package” further entrenched the separation of powers by enshrining in law the independence of the judiciary.

The process of judicial review – the subject of your conference - is one example of the separation of powers between the branches of government in a democratic system - the power of the judiciary to challenge the acts of the executive. Within this context how the judges are appointed, I think, is extremely important.

Lord Falconer, former Lord Chancellor, said, and I quote, “In a modern democratic society, it is no longer acceptable for judicial appointments to be entirely in the hands of a government minister. For example the judiciary is often involved in adjudicating on the lawfulness of the actions of the executive. So the appointments system must be, and must be seen to be, independent of Government.”

The system of appointment was indeed in need of fundamental reform. Not because it was not appointing excellent judges but because it was a secret system which was inevitably, therefore, not seen as objective and appointments were drawn from a very narrow pool - mainly the Bar.

Judicial appointments had been the responsibility of the Lord Chancellor by a convention dating back to the Middle Ages and I think it is astonishing that it took so long to change that convention.

Lord Halsbury, Lord Chancellor for nearly twenty years in the nineteenth century, made many of his judicial appointments on the basis of whether the gentlemen concerned – and, of course, they were all gentlemen - shared his political views.

Similarly, Lord Loveburn, Asquith's Lord Chancellor, openly indulged the Prime Minister's wish to reward liberal MPs who were lawyers.

It was understood and accepted that some judicial appointments would be the result of political patronage.

Although subsequent Lord Chancellors appointed "without fear or favour", usually on the advice of the senior judiciary, the need for change to the traditional system was clear.

The system had been criticised for some time. In 1991 the Law Society had described the judicial appointments process as "a very peculiar creature indeed", suggesting that it led to bias in favour of those fitting the mould of existing members of the judiciary.

So the creation of the Judicial Appointments Commission in April 2006 was, therefore, a historic step forward.

The Commission is independent of Government, independent and open in the way it makes its decisions, but accountable to Parliament through the Lord Chancellor.

The Lord Chancellor's role is limited to acting upon our recommendations. We select, he appoints. In other words he is no longer in charge but he does have sufficient responsibility to enable him to answer for the JAC to Parliament.

The fifteen Commissioners, including myself, are drawn from a wide range of backgrounds – judicial, legal and lay. Apart from three judges selected by the Judges' Council, we were all appointed through open competition, as our successors will be.

Our diverse composition means that each member brings his or her own areas of knowledge and expertise and, above all, independence of mind. No member is a delegate or a representative.

Under the Act, we were given three statutory duties:

- to select solely on merit;
- to select only people of good character; and
- to have regard to the need to encourage diversity in the range of persons available for selection for appointments.

It was up to the Commission to define merit (that is what makes a good judge). We devised the generic qualities and abilities that candidates must meet and developed new and independent selection processes. We are open and fair in our selections and have worked very hard to ensure that our processes are free of bias.

Anyone wishing to hold judicial office can now apply, provided they meet the minimum statutory entry requirements for the post in question.

Independent, openly recruited panel chairs oversee the selection process. Our selection materials are scrutinised by independent experts to prevent unfair discrimination. The progress of particular groups of candidates is monitored at key stages of each selection exercise. And I believe we have put in place a rigorously fair set of procedures.

However, encouraging applications from under-represented groups – what we refer to as widening the pool of candidates – is a much bigger challenge.

I am often asked (and what I consider to be rather an insulting question): Are merit and diversity compatible? Of course they are compatible! The integrity and excellence of our judiciary can only be enhanced, in my view, if more highly qualified people, from a wider range of demographics, apply for appointment.

But that is the problem. Many good quality candidates do not apply. We cannot impose a three-line whip on qualified people to apply to become judges. Our job is to make sure that as wide a range of people know about the judicial vacancies that come up and the minimum entry requirements of each of them.

And when they apply, and only when they apply, we can select the best people for the job.

In a recent speech the new Lord Chief Justice said, and I quote, “The most essential message I want to convey is that anyone in the professions who believes that he or she is qualified and has the aptitude for the responsibilities and burdens of a judge should try to become one.”

We need to know what people think about becoming a judge. What attracts them, what deters them? We have recently commissioned research – some of you may have received the questionnaire – and we hope the findings will enable us to direct our efforts to widening the pool effectively.

The President of the Employment Tribunals said recently that the JAC, and I quote, “has the potential to alter the historical pattern of under-representation of certain groups among the judiciary.” He is right.

Reaching these groups is a priority for us. We want to raise awareness of our role, make clear the detail of our processes, and remove lingering misconceptions.

We are committed to the search for merit wherever it can be found.

For this reason, our staff and Commissioners undertake a comprehensive programme of outreach, which includes speaking at events and running candidate road shows. But the message is always the same. You can be a judge, provided you are suitably qualified. But you have to apply. Potential judicial talent must not be wasted. And it will be if talented potential judges do not apply.

Having said that, I think we *are* making progress. In 2007/2008, the Commission’s first full year of using its own processes, many women and ethnic minority candidates successfully applied for judicial posts.

For example:

- 35% of applicants were women, as were 34% of those selected for appointment; and
- 13% of applicants were of black and minority ethnic origin, as were 8% of those selected.

This year we will have selected five women, out of the eleven who applied, for appointment to the High Court Bench, bringing the total to seventeen – which is the highest number ever.

The Tribunals, Courts and Enforcement Act 2007 has recently opened up judicial appointments to fellows of the Institute of Legal Executives, Registered Trademark Attorneys and Registered Patent Attorneys. I think this should help with widening the pool.

But, as most people will know, especially this audience, the pool available to us is small. The legal profession, like the judiciary, lacks diversity. Most, but not all, of the posts that we are trying to fill require the legal qualifications and experience that only barristers and solicitors have. Almost nine out of ten practising barristers are white. Less than a quarter of partners in solicitors' firms are female.

And I know the profession is working very hard on equality and diversity. But there is more to be done, especially if we are to change the composition of the next generation of judges at the rate that we would like.

There are also obstacles in our way to increasing judicial diversity – what we call barriers to entry – and these are often out of our control. I know that some of them are holding back the progress on diversity which is so eagerly awaited.

Some of the non-statutory requirements for particular posts represent a real barrier.

For example, the amount of fee-paid experience needed for a salaried post can prevent good candidates from applying. This is a decision for the Lord Chancellor. We have asked him to make fee-paid experience desirable rather than essential, and only a requirement when absolutely necessary.

Another area where only the Lord Chancellor can decide is the availability of posts that offer part-time working.

A lack of flexible working can act as a real disincentive, particularly for women and people who, due to caring responsibilities or disability, for example, would be unable to sit full-time.

We would also like to see barriers to appointment for the Government Legal Service and the CPS reduced.

We hope that these barriers can be overcome. They will help to increase the range of candidates and therefore increase diversity amongst the judiciary.

I have to say that the current economic climate will not make our task any easier. The Chairman of the Bar Council recently warned the diversity of the legal profession and hence the judiciary was at risk because of the credit crunch.

Encouraging judicial diversity is a joint task. We cannot achieve this on our own. It is for the profession, the judiciary, the Lord Chancellor, the Ministry of Justice and the Courts and Tribunals Services.

It's a huge cultural change.

But I am convinced that through collective action, we can achieve results.

And that is why we established the Diversity Forum earlier this year, which brings together representatives from a wide range of interested parties to work together to make a difference. It is a meaningful forum for identifying action and effecting change.

I said earlier that changes brought about by the Constitutional Reform Act 2005 represent a historic change, a vote for openness, accountability and independence.

We at the JAC are very conscious of the responsibility we carry. Because making a reality of these changes is nothing short of what I call a quiet revolution. Two and a half years is not a very long time in the history of a new organisation, particularly in the life of an organisation designed to effect a major cultural change.

Over the last two and a half years we have grappling with some of the unintended consequences of the legislation, developing strategies to bring the cultural change that the legislation demands, and at the same time building an organisation that can cope with the scale and the complexity of our statutory responsibilities.

We have, I believe, embedded effective selection processes (although there is always room for improvement), built partnerships, identified some of the barriers and have begun to make a difference. And I believe we have laid the foundations for change.

We have achieved results both in terms of quality and diversity of appointments but we are not complacent. If anything we are very impatient, but recognise that sustainable change takes time.

The draft Constitutional Renewal Bill and white paper, 'The Governance of Britain – Constitutional Renewal', published in March of this year, proposes a number of changes to the existing arrangements.

We had previously responded to the Government's consultation paper and said that while in favour of any changes that will lead to a better service for candidates and the justice system, any changes should not compromise the independence of the selection processes or the quality of selections made.

As you all know, over recent years the significance of the rule of law and the independence of the judiciary has increased. It is the rule of law which prevents the government of the day from abusing power.

This demands a judiciary which is and is perceived to be independent, highly professional and a judiciary that is composed of people from diverse backgrounds – that is in tune with our contemporary society.

The quality of our justice and the vitality and the relevance of the judiciary depends upon it, as does our competitiveness in the world.

We, along with others, are endeavouring to help achieve that.

Thank you. I would be pleased to answer any questions you may have.