Speech to the Commonwealth Law Conference

Independence of the judiciary and the legal profession

13 April 2015

It is a privilege to have been invited to give this address as we open the 19th Commonwealth Law Conference. I am particularly pleased that for the first time in many years, Scotland has been given the honour of hosting this Conference.

On behalf of Scotland’s judiciary and its legal profession, I thank you for coming here, many of you from great distances, and supporting this worthwhile event. On your behalf, I thank the Law Society of Scotland and its organising committee for their hard work in planning the conference.

Glasgow is the city in which I was born and grew up. I hope that you will experience, throughout the course of this conference, some of the good things that this great city has to offer.

This venue is on the site of one of the former Glasgow docks. It is an example of how this city has transformed itself. From a small huddle of buildings on the banks of the River Clyde Glasgow became a centre of
culture and learning in the middle ages. From that it grew to be a major maritime and mercantile city, establishing trading links in every continent. In the nineteenth century, it reached its zenith as an industrial city and as one of the great shipbuilding centres of the world. Now in its post-industrial state, it is a lively, multicultural city in which it is a pleasure to live.

I mention this history to emphasise that for centuries Scotland has had an international outlook and an international influence. It is fitting therefore that it should host this conference in which we will discuss questions affecting the rule of law that arise in many diverse ways throughout the British Commonwealth of Nations.

In the last 50 years Scotland has undergone many social changes. Our legal system, founded on the principles of the Roman law, is our inheritance from the close links that in medieval times united Scottish scholarship in all the traditional academic disciplines with the great European centres of learning. The legal system of modern Scotland has had to adapt to a rapidly changing society while remaining true to its fundamental principles. Today I wish to discuss two of these - the independence of the judiciary and the independence of the legal profession.
Judicial independence is a subject that has been discussed in countless ways and on countless occasions in conferences of this kind. If it discussed again, it will be none the worse for that. I hope that in this address I will not traverse familiar ground; or repeat truisms that all of us can take for granted.

The Scottish judicial oath has for centuries articulated the standards to which our judiciary should adhere, namely, to “do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.” That oath is the judicial Credo. The rules by which it is implemented are derived to some extent from our history, our surroundings, and our perception of what is acceptable by the social mores of the day. The idea that the judicial oath is our safeguard is one that we need to re-examine constantly and vigilantly.

The threats to judicial independence do not always come with a knock on the door in the middle of the night. In a society that prides itself on the independence of its judiciary, the threat may come in insidious ways, even at the hands of well-meaning governments and legislators, in the name of efficiency and, ironically, in the name of transparency. To protect itself the judicial system must stay aloof from controversy on social issues. Our forum is the court of law.
Judicial independence is one of the fundamental values that the institution of the Commonwealth represents. Throughout the course of the conference, in differing ways, aspects of that independence of the judiciary will underlie many of our discussions.

Society’s standards and its expectations of our justice system are changing all around us. But we must adhere to our own constant values. As Judge William Cranch put it, “in dangerous times, it becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the armed power, undisturbed by the clamour of the multitude.”¹ Only in this way can we truly defend the right of the citizen to call the executive to account.

Today I wish to discuss this familiar subject for a few moments from a less familiar standpoint. My proposition is that the independence of the judiciary cannot survive without the independence of the profession; and I ask the question “what kind of judges do we wish to have?”

The question is a simple one until you try to answer it. In 48 years in the business of the law I have known judges of outstanding academic brilliance who found it difficult to make a decision for fear of being

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wrong; or who pursued relentless logic without due regard to common sense. I have known lawyers who were not forceful pleaders at the Bar yet flourished in the judicial life when they had time for reflection. So when a judicial appointment is made and the profession – as always - passes its confident verdict, remember this: you never can tell.

This conference brings together judges and lawyers with hugely diverse backgrounds of experience. I am conscious and embarrassed that my own experience is limited to the United Kingdom jurisdictions; but I think that in what I say you may recognise some features that are familiar in most discussions of the subject in other jurisdictions.

I suggest that to answer the question “what kind of judges do we wish to have?” our starting point should be that we wish to have judges who have come to judicial office by a process of appointment that is open, transparent and fair. Only in that way can the judiciary deserve and enjoy public confidence. I think that it is fair to say that until 20 years ago, in the United Kingdom jurisdictions the appointment process – if such it could be called - remained hidden from public view and had aspects of mystery.

In the last two decades, the process by which judicial appointments are made has been radically altered in many countries of
the Commonwealth to meet the expectations of an increasingly informed public.

The Latimer House Principles require that judicial appointments should be based on merit; that they should be made by an independent appointments commission; that they should be permanent; that there should be equality between men and women and that judicial vacancies should be advertised.

A process of judicial appointment that is out of the hands of government, has the opportunity to strengthen those principles. Before our appointments system in Scotland became independent, it was largely based on a process of appointment from the senior ranks of the bar. The decision by which the selection was made, in my view, was still careful and considered; but it simply lacked any form of public transparency to allow scrutiny of the appointment.

So in arguing for a proper process, I am probably knocking on an open door.

But I have to tell you that I am one of the last judges in Scotland who were appointed under the old system, long before any formal appointments board was even in contemplation. For that reason I take great comfort from the following comment of Lord Phillips:
“Before the Constitutional Reform Act of 2005 we did not have an appropriate independent process for judicial appointments, which does not mean that those appointments were flawed.”

Contrast that method of appointment with that which led to the appointment of Judge David Prosser in the Supreme Court of Wisconsin. His honour was first appointed by the Governor of the state and then re-elected to the court in a strenuously contested election in which the candidates’ campaigns spent large sums of money. In a recent interview, Judge Prosser was asked if it was right that a judge should recuse himself in a case involving one of his campaign donors. Judge Prosser thought not. This was his untroubled reply. He said:

“The effect of even large contributions can wear off after a reasonable time has passed, so long as it doesn’t involve a case that was pending at the time the contribution was made.”

Clearly a jurist who deserves a wider public.

But the real and inescapable question is – if our process of appointment is duly Latimer-compliant, what are to be the criteria for appointment? Nearly 30 years ago an Australian writer summed it up in this way:

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“If [judges] are professionally qualified and personally men of integrity and good character, the justice they administer will undoubtedly be of superior quality. Likewise, if they are independent, courageous and maintain high moral standards, the people will be judged fairly and justly and will enjoy adequate protection under laws of the society in which they live.”

Most appointing bodies will adopt the principle that their sole criterion is merit, while adding that they are also committed to the creation of a judiciary that fairly reflects the balance of the sexes and is representative of the minority groups in modern society. That is simply an attempt to square the circle. Some academic writers would have it that being a woman or a member of a minority group is itself an aspect of merit. That is surely special pleading. If it is true, then a merit-based appointments system may discriminate against deserving candidates who are not women or members of minority groups.

But process is not all. What matters is outcome. That depends on the pool from which judges are recruited. The law is a living thing. It is in an endless process of development. If a legal system is to survive and flourish, it must be responsive to change; for example change in society, in commerce or in technology. That is particularly true of a

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small jurisdiction such as Scotland that has its roots in the Roman law rather than the common law, and holds principle to be to be more valued than precedent when the two collide. I suggest to you that while academic excellence cannot be the sole criterion for judicial appointment, no judiciary can survive without a solid substratum of academic excellence among its number. The law that we serve is an intellectual discipline. If a legal system is to survive it must be in the hands of judges who have a profound understanding of its theoretical roots and of the concepts by which the process of legal analysis is carried out. We need judges who have the qualities of imagination and inventiveness by which the law develops and without which judges become the hapless captives of precedent. Today’s appointee may in due time ascend to the appellate courts in whose hands, it can truly be said, the future of a legal system lies.

How and where are such judges to be found?

One advantage of the old system was that appointments were made from the senior ranks of the Bar; from lawyers who had proved themselves through many years of court experience in a competitive professional environment, acting as independent practitioners in varied and diverse areas of the law. There was much to be said for that. Even
the best process will achieve nothing unless judges are being recruited from the best in the profession.

This is why we need a truly independent profession. One in which pleaders have wide practical experience; who are beholden to no-one; and who are fearless and courageous. In my view, the public interest lies in the survival of a vigorous, independent referral bar.

That is why I suggest for your consideration that one of society’s priorities is to foster the independence of the profession and particularly the independent referral bar. It is in the interest of the public that every citizen should have available the services of lawyers who have no ties to any organization and whose duties lie only to the court, to the client and to their own professional body and its exacting standards. The independence of the citizen’s defender is the surest bulwark in the defence of the rule of law. And it is in that tradition of independence that the judiciary should find its greatness.

It is clear that in Scotland, and perhaps also in the other United Kingdom jurisdictions, there is a reluctance to seek judicial appointment among some who are in the front rank of the profession. Why should that be so? In my view, appointment to the judiciary is a privilege and an honour to which every member of the profession should aspire. It is
the noblest of callings. It seems to me that where it is clear that some of the best of the profession are not interested in a judicial career, there is something wrong - either with the conditions of the job or with the appointments system itself.

If we consider the conditions in which judges work, I am convinced that salary and pensions are not the sticking point. I suggest that the serious deterrents are the loss of independence; the pressure of judgment writing; the loss of the comradeship of the profession; the lack of opportunity to specialize; an overall feeling that the work of judges is not appreciated; and the hostility of critics who are suspicious of everything that we do. All of these erode judicial morale.

As for the appointments process itself, we should perhaps consider whether, good and thorough though it may be, it is appropriate for such a unique form of public service.

Inevitably a process that is administered by the public service will adopt a typically public service appointment model. That may not be the best model for appointments to an office of constitutional significance. We must ensure that the appointments boards include people of significant legal experience, as well as lay membership that will provide a check on the process from a detached standpoint. Lay
members from a variety of backgrounds possessing different life experiences can evaluate non-legal competencies from the ordinary citizen’s perspective. Temperament and commitment are attributes that require no legal skill for their assessment.

Nevertheless, a practitioner who has devoted his professional life to the practice of the law as an independent pleader and adviser, and who is unfamiliar with the language and the priorities of the world of HR, may find the process difficult. An appointments process should not act as a deterrent to applicants from the leading ranks of the profession nor blind itself to the qualities of the occasional brilliant, but perhaps quirky, applicant in favour of the undistinguished individual who does not put a foot wrong in an interview. This may be a matter for consideration in workstream C.

It may be that there is a case to be made that the system should seek out candidates from among those who are secure in their reputations as lawyers of distinction. Perhaps we should listen to the words of Jethro as he counselled Moses in the book of Exodus:

“Now search for able men among all the people, men who revere God, and are honest, men who despise unfair profits ... and let them judge the people at all seasons.”

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In order to attract new judges to the bench, we also require a comprehensive system of judicial education and training that will support judicial office holders throughout their careers. No one comes to the bench fully formed.

The highest priority of judicial education is not to teach judges the law, but to teach them about themselves. The life of a judge is a lonely one where the only support network available is that of one's colleagues. In any system of judicial training one of our primary aims should therefore be judicial resilience - the ability to detect one’s own shortcomings not only in the practice of judging, in the writing of judgments and so on; but in one’s attitudes and deepest prejudices, and in the impact of one’s decision on the litigant; but also the ability to detect in colleagues the early signs of stress and depression to which our work sometimes exposes us.

A related and more obvious aspect of judicial professionalism is judicial discipline. It is immediately obvious that there is a tension between the concepts of accountability and independence. There must be an effective mechanism in place for investigating and sanctioning misconduct without eroding the independence of the judiciary. Appointment to the bench does not confer immunity from discipline. It
is therefore usually suggested that judicial discipline should be left in the hands of the judiciary themselves. That excludes the possibility of interference from the executive, but it does not entirely resolve the independence problem. If the judiciary is essentially self-regulating, the perception of a judiciary driven by self-interest and self-protection, and shrouded in mystery, will do us great damage. It does little to ensure that the public have a satisfactory impression of accountability.

In Scotland, this difficulty has been overcome by our adopting two distinct processes, namely, a complaints procedure and a ‘fitness for office’ procedure.\(^5\) If I were to conclude that a judicial office holder was unfit for office, the matter would be referred to an independent tribunal to investigate and report on whether there was unfitness to hold office by reason of inability, neglect, or misbehaviour. I have never had to take such a step. Disciplinary procedures of this nature are rare. We are fortunate to have a professional and dedicated judiciary. Perhaps, that is a reflection of the fact that we now have a comprehensive Statement of Principles of Judicial Ethics that spells out exactly what conduct we expect of our judiciary.

\(^5\) Judiciary and Courts (Scotland) Act 2008, chapters 4 and 5
I have spoken elsewhere of the importance of formulating such guidance, preferably in a formal code of judicial conduct. It strengthens judicial independence by holding out to society the standards to which it can expect the judiciary to adhere and against which it should be judged.

Whether we like it or not, judges and the legal profession are the legitimate subject of media comment. We must be prepared for criticism and simply accept the fact that we cannot answer back.

Two years ago, I was crossing the square outside my court when I noticed two individuals standing, perhaps appropriately, at the Heart of Midlothian, the scene of public executions in Edinburgh in former times. They were holding a large banner. It caught my eye. It said “Lord Gill - Resign!” I never discovered what their reasons were; but I thought what a privilege it was to be a judge in a society where the public could make a constructive suggestion of that nature without being taken away by the police.

Criticism of one’s judgments in the media is never a pleasant experience; but, as Lord Woolf has commented, we must swallow our pride and be thankful for a free press which stands to safeguard our independence. Let me quote his words:
“The media can be among the staunchest protectors of the independence of the judiciary. They do not wish to see an executive not subject to any control. If a government is intent on destroying the independence of the judiciary the next candidate is likely to be the media. A regime intent on undermining democracy will quickly find, as Hitler and Stalin did and more recently Mugabe has, that a free and independent judiciary and media are an inconvenience that needs to be dealt with.”\(^6\)

Independence relies upon public understanding of our courts and the way in which they should expect our courts to operate. Public awareness breeds public confidence. For most people, newspaper accounts of court cases are the source of their knowledge of our justice system. There is inevitably a tension in the relationship between the judiciary and the media. The court adjudicates on matters involving the media fairly frequently. Therefore, as Lord Woolf rightly observes, we should be circumspect about having a relationship with the media that might cast doubt on judicial independence. It is a fine line to tread. In modern times, our court systems have a dedicated media team, who liaise with the media to ensure that there is an open and accurate flow of information. For, the media are helpful to our cause only if facts are reported with accuracy. Good communication with the media – at

arm’s length – is a sign that our court system is in touch with the community and. I would argue, is in itself an important aspect of judicial independence.

So, what kind of judge do we wish to have? First and foremost a judge who is appointed fairly and publicly. Every decision to appoint is made \textit{ad hoc}. Therefore we should not be excessively prescriptive lest we fail to allow for the unforeseen. But certain general priorities are there for your consideration. It is surely desirable that our ideal judge should be one who has experienced the true meaning of an independent profession and who exemplifies excellence allied to good judgment. A judge who is willing to learn and to be accountable. A judge who has self-knowledge, humility, and an understanding of the nobility of the office to which he has been called.

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\textbf{Lord President}

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