What Makes a Good Judge?

The Right Honourable Lady Rose of Colmworth DBE

16th June 2022

It has been said that "Without a judiciary which can and will administer law fairly and fearlessly between parties, no other guarantee given to the litigants by the law is likely to be of value."[1] Over the centuries there has certainly been no shortage of descriptions of the qualities that one should be looking for in a judge from ancient times to modern.

Socrates said, "Four things belong to a judge: to listen courteously, to answer wisely, to consider soberly and to decide impartially". In the Bible, in the book of Exodus Jethro advises Moses to establish a judiciary system to share the load of deciding the legal disputes which were taking up too much of his time. Jethro advises Moses to seek out "able men, such as fear God, men of truth, hating covetousness".

Moving forward in time, sometimes judges themselves give a perceptive insight into what they think would improve their performance. Sir Matthew Hale, Chief Justice from 1671 to 1676 wrote for himself a number of resolutions to which he no doubt tried to stick.[2] These included "That I suffer not myself to be prepossessed with any Judgment at all, till the whole Business and both Parties be heard" and "Not to be solicitous what Men will say or think, so long as I keep my self exactly according to the Rule of Justice." Also "To be short and sparing at Meals, that I may be the fitter for Business."

In our own time Lord Neuberger of Abbotsbury described the basic qualities needed for a puisne judge when running a trial as "grip, authority, politeness, fairness, an ability to simplify and an ability to express yourself."[3]

Six principles are contained in the Bangalore Principles of Judicial Conduct drafted for the international Judicial Group on Strengthening Judicial Integrity in November 2002. Those principles are reflected in the code that governs my conduct and that of my colleagues as judges in the courts of England and Wales. The Guide to Judicial Conduct published by our Judicial Studies Board introduces in broad terms the six Bangalore Principles. They are judicial independence, impartiality, integrity, propriety and the appearance of propriety, equality of treatment to all before the courts, and competence and diligence.

All those qualities that we believe make a good judge – and more - are subsumed in the single criterion for the appointment of judges set out in the Constitutional Reform Act 2005. This provides in section 63(2) of that Act that the selection of judges must be solely on merit.

But what does 'merit' mean in this context? Has the content of that word changed since the enactment of the CRA? More specifically, what can we learn from the overhaul of the processes for appointing judges about who we think makes a good judge?

Before the changes brought about by the CRA, the assumption was that if you were a good and successful barrister then you would make a good senior judge. It has always been rather mysterious to me as to why that assumption lasted for such a long time. Many of the skills needed for being a top advocate are not at all what you need to be a good judge – a single minded pursuit of one side of the argument only, an ability to

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[1] J.S Jolowicz "England" in M Cappelletti and D. Talon (eds) Fundamental Guarantees of the Parties in Civil Litigation (Milan: Giuffre 1973 p. 121). I am grateful to my judicial assistant Jake Thorold for his help in preparing this lecture.

[2] Quoted in *The Rule of Law* by Rt Hon Lord Bingham of Cornhill KG PC FBA Tom Bingham (Penguin Reprint edition Feb 2011).

[3] Lecture given to the Oxford Law Faculty February 2017.

cross examine witnesses to make them say what you want them to say, an ability to make a thoroughly bad legal submission seem plausible and attractive. All those are talents which, one would hope, the barrister can and must firmly put aside on attaining judicial office.

Not only was there that assumption that good barrister equals good judge, but it was so strong that it was thought that a successful barrister would not need any training on making the move to the Bench. Lord Judge, former Chief Justice, has remarked in a lecture given to the Judicial Studies Board that when he was appointed to be a Recorder of the Crown Court in 1976, he sat for two years before he received any training at all.[4] That was not, he says with characteristic modesty, because of his remarkable talents but that there was not thought to be any need for training. Indeed, he notes that at the time the Judicial Studies Board was set up, there was significant judicial antipathy towards it with many thinking that training was an interference with judicial independence. The fact that it was called the Judicial *Studies* Board was a deliberate attempt to reconcile those who thought that they were demeaned by the implication that they might need *training* in the performance of their responsibilities. By 2013 when Lord Judge was giving his lecture, he said that judges now welcome training and know that it has no bearing whatever on their independence. "Being a judge in the modern world does not merely require such education and training, it requires a frame of mind in which these positive advantages are welcomed."

I think the reason why it was assumed that good barristers make good judges was the pre-eminence given for so long to intellectual ability, and intellectual ability of a certain kind to the exclusion of almost every other quality. Judges see that the barristers appearing in front of them are dealing with knotty legal problems or sorting out from a morass of evidence what is and is not relevant day in day out and that is also the daily fare of the working judge.

It is true that you do need to be very clever to do my job. It is a particular kind of cleverness that is needed. I was thinking of this when reading a biography of the great physicist J Robert Oppenheimer.[5] He and the other physicists who unlocked the secrets of the atom in the early 20th century and worked on the Manhattan Project were clearly very clever – but were their brains wired up differently from those of say, Lord Atkin or Lord Wilberforce? If the young Tom Bingham had decided to become a scientist rather than a lawyer, would he have excelled at that in the same way as – luckily for us – he did in the law?

One difference that strikes me is that Oppenheimer, von Neumann and their colleagues thought about, debated and puzzled out the structure of the atom over many decades. The ability that a good judge needs to have is to absorb a mass of information in a day or so. Even in the Supreme Court, with the press of many different demands on our time, we usually have at most 2 days in which to learn usually from scratch the factual and legal content of a case before the hearing. The topics covered by the work are tremendously varied. In my judicial work in the Supreme Court and the Judicial Committee of the Privy Council I have dealt with cases in areas that were entirely unknown to me before I clicked on the electronic bundle to prepare for the hearing coming up in a few days' time These include the international legal and institutional framework governing fishing for tuna in the South Pacific,[6] the rights to water flowing in rivers and canals in Mauritius,[7] or, closer to home the operation of the qualified one way cost shifting regime in the CPR[8] as well as many mind numbingly complicated tax cases about VAT, corporation tax and the taxation of dividends.

Every judge has to be clever enough to be able, within the space really of a few hours not only to read and understand the material but to get themselves into a position to decide which of the two competing sets of submissions is right – to be able to challenge those submissions of counsel, – who may well have been working on the case for years – to discuss the case intelligently with colleagues, and then write a judgment or comment on a draft written by someone else. From start to finish the judge's involvement with the case may last a few weeks or months at the end of which the judge has to produce an authoritative and reasoned decision. That takes a particular kind of intellectual ability – though I am not sure whether that answers my question about whether Lord Bingham in some counterfactual world could have invented the atomic bomb –

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[4] The lecture is included in the collection *The Safest Shield* (Hart 2015) p 286.
[5] *Inside the Centre, the Life of J Robert Oppenheimer* Ray Monk (Penguin Random House, 2013).
[6] *Framhein v Attorney General of the Cook Islands* [2022] UKPC 4.
[7] *CIEL Ltd and another v Central Water Authority (Mauritius)* [2022] UKPC 2.
[8] *Ho v Adelekun* [2021] UKSC 43.

or indeed whether J Robert Oppenheimer could have written the judgment in *A v Secretary of State for the Home Department*.

There is, fortunately, an increasing recognition reflected in judicial appointments that barristers in private practice do not by any means have a monopoly on the kind of intellectual ability that is needed to become a judge. This raises the allied question of how far experience of court-based advocacy or litigation more generally is a pre-requisite for being a good judge. I am often asked when I give talks to lawyers in the Government Legal Service where I worked for much of my career or to solicitors who are not in a dispute resolution team whether I think that having experience of court work is necessary before applying for judicial appointment. My answer is usually that you might struggle to settle in as a judge if you did not start out with a rough idea of what the relevant procedural rules say – or if you had never seen a set of pleadings before or did not know the basics of for example interlocutory injunctions.

However maybe I am being too parochial. Some other jurisdictions operate on a very different basis. For example, in France a lawyer can qualify as a judge straight out of university and judges are not ordinarily recruited from the ranks of lawyers. They are specifically trained for the role via a standalone process, and it is common for a person to become a judge before they turn 30.

With certain exceptions, most aspiring judges in France are required to train at the Ecole nationale de la magistrature ("ENM") in Bordeaux. This is the only judicial training school in the country. Admission to the ENM is determined by competitive examination. The coursework lasts 31 months followed by a cycle of traineeships in the court system and supporting agencies (for example juvenile facilities). At end of this period a prospective judge takes another exam and is presented with a list of available judicial posts prepared by the Ministry of Justice. Initial appointments are made on the basis of exam scores – those receiving highest scores get the pick of positions. Most ENM graduates are appointed to a judgeship in the provinces at the lowest level, working as investigating judges or members of benches adjudicating minor criminal cases. They then work their way up the judicial ladder throughout a long career entirely within the judiciary.

By contrast, although the previous focus on appointing barristers suggests that merit did include experience of court work, the idea of a career judiciary used to be almost unheard of in United Kingdom courts. People tended to choose the level at which they wanted to join the judicial system and expected to stay there for their whole judicial career. In more recent years there has been more movement for example of judges appointed in the Crown Court moving to the High Court Bench and judges in the tribunal service, where I had my first judicial experience – moving to be district judges or High Court judges. This has benefits for diversity too as those branches of the judiciary tend to have a better gender and ethnic balance – something I'll discuss more later.

Moving on from intellectual ability, there has always been at least one additional requirement for being a good judge and this is also now encapsulated in section 63 of the CRA. Section 63(3) says that a person must not be selected unless the selecting body is satisfied that they are of good character.

The Judicial Appointments Commission provides useful guidance to would-be applicants about how it assesses good character. The principles it adopts are based, it says, on the overriding need to maintain public confidence in the standards of the judiciary and the fact that public confidence will only be maintained if judicial office holders maintain the highest standards of behaviour in their professional, public and private lives.

It is interesting to see how the content of this requirement reflects the modern zeitgeist. Let me give three examples:

The first is that, as you might expect, conviction of a criminal offence is likely to disqualify you from holding office. Judicial appointments are covered by the Exceptions Order to the Rehabilitation of Offenders Act 1974[9] so that spent convictions and cautions are not protected from disclosure for these purposes. The JAC takes all criminal convictions and cautions seriously, and you must disclose to the JAC any you have received regardless of whether they are spent or unspent. However, forgiveness is not entirely alien to the selection process. As a general guide, the JAC may consider you suitable for appointment following a period of 6 years

[9] The Rehabilitation of Offenders Act (Exceptions) Order 1975 (SI 1975/1023).

after you have received a caution, or a period of 11 years following a conviction. The JAC will, as one might expect, make each decision on a case-by-case basis.

The attitude towards motoring offences is quite nuanced. In general, the JAC guidance says, any conviction for a motoring offence will be treated in the same way as any other criminal conviction and a conviction for an offence related to driving under the influence of alcohol or drugs is likely to prevent your application from proceeding. Conversely parking tickets or speeding offences dealt with by way of an informal warning, or a speed awareness course do not have to be declared. In between are fixed penalty notices including for moving vehicle offences. Although they do not form part of your criminal record they must be declared if received in the last four years.

The obligation to disclose is a continuing one. This is made very clear in the application form and, unfortunately, became relevant to my own application for appointment to the High Court bench. The only time I have been fined for a moving vehicle offence was a week or so after I submitted my application to join the Chancery Division. I accidentally drove in a bus lane in my increasingly frantic attempts to escape the St Albans one-way system trying to find the Crown Court where I was due to sit as a Recorder. If it had been a criminal offence to be driving a motorised vehicle on a public highway whilst sobbing I would have to have ‘fessed up to that as well. Fortunately, the panel was in a forgiving mood and my trespass did not result in my judicial career meeting a premature end.

The second aspect of good character stressed by the JAC is the importance of your tax affairs being in order and of complying in a straightforward and transparent way, with your obligations in relation to tax. This I would suggest properly reflects the current sense that good citizens and hence good judges should pay their taxes.

Sticking with money for the moment, I came across a fascinating if slightly recherche article by the late Professor Peter Birks discussing a recent discovery by metal detectorists in Seville in Spain of 10 bronze inscribed tablets dating back to AD 91, the rule of the Roman Emperor Domitian.[10] One of the many topics covered by the inscriptions were the qualifications for appointments to the judiciary. This discloses that in order to be appointed to be a judge in Rome, a candidate had to have a certain amount of money and the higher the judicial office, the more money he had to have. It is difficult to see what quality this was supposed to reflect. It does not seem to be a proxy for the candidate being hardworking and industrious because it is clear that money could be inherited from the judge’s father. If the thought was that judges with a lot of money would be less amenable to be bribed because they already had “enough money”, that shows a naivety about human nature that is uncharacteristic of the Roman society that emerges from Roman law more generally.

The third aspect of good character that I would like to focus on is the changing attitude to rudeness and bullying by judges. Socrates as I have mentioned listed the ability to listen courteously as one of the characteristics of a good judge, but this quality has not invariably been manifest in our courts. This topic has been the subject of a great deal of attention recently. In February 2019 the Bar Council published guidance to barristers about judicial bullying. It defines bullying as offensive, intimidating, malicious or insulting behaviour involving the misuse of power such as can make a person feel vulnerable, upset, humiliated, undermined or threatened. The Bar Council recognises that when bullying by judges occurs, it presents additional challenges because those who are a target may feel unable, or particularly reluctant, to do anything about it, even though the impact may be particularly acute.

I agree with the article written by a senior barrister in New South Wales and included in the Handbook for Judicial Officers in that Australian jurisdiction. It contains this observation. “The idea that judicial bullying is a necessary “rite of passage” for junior counsel is outdated, dangerous and wholly unacceptable. Older practitioners relating “war stories” of how they were mistreated by former judges should not be a source of admiration but rather, a sad indictment that this issue has not been addressed earlier. Just because one has suffered the humiliation of judicial bullying and “lived to tell the tale” does not mean that it should be an

[10] *New Light on the Roman Legal System: the Appointment of Judges* Peter Birks (March 1988) Cambridge Law Journal 47(1) 36 – 60.

experience visited upon the newer members of the Bar. Rather, it should be the trigger for right-thinking members of the Bench and Bar to ensure that such behaviour is treated with opprobrium."

Why has unpleasant behaviour in court fallen so far out of fashion? It is partly, I think, because younger lawyers have been educated in a school and university system that takes bullying seriously and they are, quite rightly, no longer prepared to put up with it.

To my mind this whole issue is much more significant than just being a way of protecting barristers from having a bad day at the office – important though that is. If lay clients sitting in court see the judge being rude and impatient with their counsel or with the witnesses on their side, they will feel strongly that they have not had a fair hearing. Their dissatisfaction will not be only with the judge, but also, however unfairly, with their counsel and with the overall process of adjudication. This becomes vicious circle because an advocate will rarely give his or her best for the client, or the cause, or for the court, when subjected to undue pressure.

The importance of what is said as well as what is done by the judge in court is also reflected by an interesting statistic about the categories of complaints about judicial conduct made to the Judicial Conduct Investigations Office. The JCIO's annual report for 2020-2021 states that 232 complaints – about 19% of the total – were about inappropriate behaviour by the judge. The Report states that most of these complaints are found to be unsubstantiated or, even if true, insufficiently serious to require disciplinary action to be taken. But the fact that 232 people took the trouble to lodge a complaint with the JCIO about behaviour in court is a salutary reminder to any serving or would be judge that people are listening and watching and holding us to a high standard as regards our behaviour.

At the other end of the spectrum, does a judge need to have a sense of humour? That New South Wales Judicial Conduct Handbook contains a delightful article by the Honourable Judge Kyrou of the Court of Appeal, Supreme Court of Victoria. He discusses some of the key personal attributes of a good judge, in which he includes not only independence, impartiality and communication skills, but also patience, cultural awareness and tolerance, people skills, a sense of perspective and a sense of humour. He says "The administration of justice is a serious business, with important obligations and responsibilities. Court cases involve tremendous stress for court users and therefore the courtroom is not the place for judges to try their hand at being comedians. That does not mean, however, that judges must be perennially uptight and unhappy. A balanced lifestyle, interests outside the law, a down-to-earth personality and a good sense of humour can increase a judge's enjoyment of the judicial role. This can assist in ensuring that the mood in the courtroom is positive which, in turn, can ensure that the hearing is conducted in an efficient and harmonious manner."

One can contrast this with the comment of Lord Judge in that 2013 lecture I referred to earlier. He also lists the qualities that he considers the modern judge must have. These include the ability to make decisions that are profoundly unpleasant and have very serious consequences. "This is not a fun job" he said, "and you have to do it." I would say that that is true of course, but that the job is sometimes a fun job and if you are going to get through the difficult and tense times, it can be helpful to be able to lighten the mood when that is appropriate. That said, judges have sometimes got into trouble for flippancy or inappropriate remarks. Every judge must also bear in mind that you do not get a genuine reaction from those in court. So, the fact that everyone in court roars with laughter at some little quip you make at the end of the day, should not encourage a judge to give up the day job and start working the circuit as a stand-up comedian. Your audience might well be rolling their eyes as soon as you leave court.

No talk – or at least no talk by me - about what makes a good judge is complete without some mention of diversity. This is also dealt with in section 63 of the Constitutional Reform Act. Following on from the provision that appointment must be 'solely' on merit, subsection (4) qualifies this by providing that the use of the word "solely" there does not prevent the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity within the group of persons who hold office for which there is selection under that Act.

Critics of this provision have commented that this appears to embrace the view that diversity is something different from merit and as if there has to be a choice made between the two ideas - or a balance of them, treating them as competing goals. Another way to look at it is to recognise that for many centuries the selection of judges has not truly been on merit – or rather it has been limited to comparing the merits of only

a very narrow group of people. This does not seem to have troubled those who have been selected under that system and who are sometimes heard to complain about the unfairness of this tie-breaker provision. By contrast, it might be said that by the time a woman or a person from an ethnic minority community gets to the position where subsection (4) might be triggered, they must already have overcome such challenges of conscious and unconscious bias that they may well be of greater merit than their rival.

Further, treating the ability of a candidate to bring a fresh perspective from a different life experience as being something not embraced by the term "merit" seems to me unfortunate. This was put very well by Sir Sydney Kentridge when he gave the second Sir David Williams Lecture at Cambridge University in May 2002.[11] The topic of his lecture *The Highest Court: Selecting the Judges* was prompted by the coming into force of the Human Rights Act 1998. This Act, Sir Sydney said, permits and requires hitherto unknown judicial interventions not only into the sphere of executive action but also in the sphere of legislation. Did this, he asked, mean that we should look for different qualities in our top judges? Sensitivity to social issues and an appreciation of the importance of individual rights would be desirable qualities – if only, he says, there were some ways of discerning them.

Sir Sydney compared the at that time entirely white male middle class members of the House of Lords with the South African Constitutional Court on which Sir Sydney sat as an acting justice. Of the eleven judges on that Constitutional Court, there were six white men, three black men, one black woman and one white woman. Five had been high court judges, some had come directly from the Bar and at least four had at some point been academics as well as having worked in private practice either as advocates or attorneys. One had been a political exile. Sir Sydney writes "They were all good lawyers, But what I found overwhelming was the depth and variety of their experience of law and of life". This diversity, he said, illuminated their discussions when he was sitting, especially when competing interests, individual, governmental and social had to be weighed. "I have no doubt", he said, "that this diversity gave the court as a whole a maturity of judgment it would not otherwise have had".

That brings me to another quality required of judges. The Framework of Judicial Abilities and Qualities published by the Judicial Studies Board lists compassion as one of the qualities included under the umbrella of "Community and authority" along with "firmness without arrogance" and "sensitivity". This quality is discussed by Robert J Sharpe, a judge of the Court of Appeal of Ontario in his book "Good Judgment: making judicial decisions".[12] He notes that our most respected judges are often described as compassionate.

But what exactly does it mean to judge with compassion? The law is the law and must be applied with an even and consistent hand and cannot be modified on grounds of sympathy or emotion. Indeed, I would add in parenthesis, another of the qualities in the Judicial Studies Board's Framework is "remains detached and manages one reactions and emotions".

Judge Sharpe's answer is that judging is not an abstract or mechanical process – it is an intensely human process. The judge is engaged in unravelling and resolving disputes that often have had a profound effect on the lives of the litigants. A judge who is able to see all sides of a problem has a better chance of making a decision that is both fair and just and seen to be fair and just. He quotes Canadian Chief Justice Brian Dickson as saying that a judge must be guided by an ever-present awareness and concern for the plight of others and the human condition - compassion is not some extra-legal factor magnanimously acknowledged by a benevolent legal decision-maker. Rather, compassion is part and parcel of the nature and content of that which we call "law"".

That is certainly something that accords with my own experience and is true whatever area of the law you specialise in as a judge. One thing that struck me during my time as a judge in the Chancery Division is how often what appears on the face of it to be a rather dry case exploring some arcane provision of the Companies Act or the Insolvency Act in fact arises from a very human dispute between the litigants. The parties use the courts to resolve their own feelings of upset or betrayal about some business partnership that went wrong or

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[11] *The Highest Court: Selecting the Judges* included in *Free Country Selected Lectures and Talks* Sir Sydney Kentridge QC (Hart 2012), p. 119.

[12] *Good Judgment making judicial decisions* Robert J Sharpe (Univ of Toronto Press 2018). I am grateful to my colleague Lord Burrows for recommending this book to me.

some ambitious commercial venture that unhappily foundered, throwing their lives into turmoil. So, as a trial judge, being able to feel compassion or being able to empathise with the parties and the predicament they find themselves in is often an essential part of being able to decide which of the parties is giving the more accurate account of what happened when you come to make the findings of fact that are going to form the bedrock of your application of the law.

Following on from that thought, let me close by sharing some advice I give to judges just starting out – and which indeed I regularly give to myself and which I find very helpful in my desire to be a good judge. Bear this in mind. For every case that you preside over, there comes a point a day or so before the hearing when the lawyers involved in the case find out from the listing office that you are going to be the judge hearing their case. They ring up the client and say, we've just heard that we have Mrs Justice Rose or Mr Justice X. Inevitably the client asks: "Is that good or bad? What is she or he like?" If you want to be a good judge, try to think of how you would like the lawyer to respond to that question from the client… and then - in all the different aspects of your conduct in and out of court – try to behave so as to bring that about.

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