

## From a Judge's Perspective: An Interview with the Chancellor of the High Court

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Since being appointed Chairman of the Law Commission in 2006, Sir Terence Etherton has held a reputation for calling attention to themes of legal accessibility and law reform. Specifically, his efforts to engage both lawmakers and the judiciary to make law more accessible and ensure that legal reforms receive sufficient parliamentary debate have earned him commendation from the highest quarters of the legal profession.

Following the Law Commission, Sir Terence served as a judge of the Court of Appeal until his appointment as Chancellor of the High Court in January 2013. Only a month after this appointment, the Birkbeck Law Review had the unique opportunity to speak to Sir Terence concerning his work at the Law Commission and as a senior member of the judiciary. As evident in this interview, Sir Terence's dedication, insight and commitment to the legal profession are inspirational, and profound.

Aside from his formal duties as a judge, Sir Terence, a graduate of Cambridge University, continues to serve the legal community by educating the next generation of legal professionals as a visiting professor in Birkbeck College, University of London. We hope that this interview, prepared by the Birkbeck Law Review, is as beneficial for our readers as it was for us.

THE BIRKBECK LAW REVIEW: *Chancellor Etherton, thank for you agreeing to this interview with the Birkbeck Law Review. We would like to begin with a few questions concerning your work in the Law*

*Commission before moving on to themes of judicial diversity and the evolution of social values.*

*During your term as head of the Law Commission, you mentioned that you wanted to see law become more ‘accessible, intelligible, fair and modern’ – in essence, a constitutional right of every citizen. Would you be able to expand further on this statement? How did the Law Commission seek to do this?*

THE RT. HON. SIR TERENCE ETHERTON: The Law Commission was set up in 1965. It was the first permanent body devoted to law reform in the United Kingdom. There had been only one other permanent independent law review body in the world previously, and that was in India. Prior to the Law Commission of England and Wales, models for law reform were either, as in this country, successive committees set up for particular law reform projects by Lord Chancellors, or, as in some other countries, law reform by the civil servants of ministries of justice.

The important novel feature of the Law Commission of England and Wales was that it was a body separate from the government. It was independent and had projects of law reform on which it consulted the public. The remarks which you have quoted are taken from the White Paper which preceded the legislation setting up the Law Commission. The White Paper explained the ethos behind the creation of the Law Commission. The objective was a permanent body dedicated to law reform and independent of the government.

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It was thought that such a body would be more capable of achieving the objectives than any other model. Since its creation, this model has been followed by numerous after developed countries and some developing countries throughout the world. I think it is fair to say that the Law Commission of England and Wales is regarded as, if

not the foremost, certainly one of the leading independent law reform bodies in the world.

*How would you rate the effectiveness of the Law Commission?*

SIR TERENCE: The success of the Law Commission in achieving law reform has varied from time to time. When the Law Commission was set up the Lord Chancellor was Lord Gardiner and Lord Scarman, a very distinguished judge, was the first chairman. Lord Gardiner had previously contributed to a book on law reform that played an important part in procuring the legislation that set up the Law Commission. When he became the Lord Chancellor, under the first administration of Prime Minister Harold Wilson, he had the opportunity to put into practice some of the ideas in that book.

So it was not surprising that when he was Lord Chancellor and Lord Scarman was chairman every law reform the Commission proposed was enacted. Consequent to that time, the effectiveness of Commission has varied. There were times when the Commission's proposals for law reform lacked parliamentary time and political priority. Although the Law Commission was doing a great deal of work on many excellent projects, its proposals were often waiting on the side lines because successive governments didn't have parliamentary time. One of things I sought to do when I became chairman was to understand what had gone wrong and how we could achieve a higher rate of success in the legislative implementation of the Commission's projects.

I established new processes to ensure a higher success rate. As I have said, one of the problems was to secure more parliamentary time to legislate for the Law Commission's law reform proposals. We accomplished that by the establishment of a special new procedure for uncontroversial, that is non-political, Law Commission Bills in the House of Lords, which has proved to be a huge success. Law Commission Bills tend to start in the House of Lords and then go to the House of Commons. The idea was partly to take the Bills off the

floor of the House and into committee, where they could be discussed extensively.

A number of law reforms would not have gone through without that special procedure.

Secondly, we procured the enactment of the Law Commission Act 2009. That Act places on the Lord Chancellor an obligation to give a report to Parliament each year as for why any Law Commission recommendations have not been implemented, or, if they are going to be implemented, as to what will happen to them. The Lord Chancellor is now accountable for the first time to Parliament as to why Law Commission Bills or projects are not being enacted.

Thirdly, we negotiated a protocol governing how Law Commission projects would be carried out with the collaboration of government

departments. In the past, what would happen was that various items in the Law Commission's three year programmes of reform were selected, and then

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approved by the Lord Chancellor. The Law Commission would consult the individual departments, but that was it. It was entirely unknown at the end of the day if the department would support the final proposals or get any parliamentary time for them.

Although I started the process of discussion, this protocol was eventually agreed after my time. Its consequence is that Law Commission projects are only taken on if the department is willing to collaborate with the Law Commission, supporting the relevant reforms and promoting them within government.

So, when you ask whether the Law Commission has been successful, in terms of getting its proposals for reform enacted, I would say that it's had its ups and downs but it is doing well now. It goes without saying that its reform proposals cover a very wide range of different areas of the law: family, trusts, crime, commercial, contract, proper-

ty, etc. Within those broad areas of law, the Law Commission has been extremely successful in achieving the objectives of reform.

*On the issue of judicial diversity, statistics show groups, such as women and ethnic minorities, still accounting for a very small percentage of judges in the UK. For women in particular, the percentage remains among the lowest within developed countries. How would we continue to work to improve such disappointing numbers in coming years?*

SIR TERENCE: When we talk about diversity my view is that we should avoid limiting it to gender and ethnicity. We should have a much more sophisticated view of what diversity means and its importance within the judiciary. There are two elements that we must consider here, when one is talking about diversity and its importance within the adjudication process.

One is a legitimacy issue. In any democratic society it is important that to some reasonable extent the judiciary should reflect the diversity of the population. Everyone should have access to the legal profession as a career and not be restricted from entering it and succeeding in it because of race, gender, sexuality etc. It is not possible, of course, to achieve a judiciary whose composition precisely and proportionately reflects every human element in our society.

[Justice of the Supreme Court] Brenda Hale once said, in her evidence to the House of Lords' Constitution Committee a couple of years ago, that litigants shouldn't come into the Supreme Court and see her as the only woman, sticking out like a sore thumb. Having a woman in the Supreme Court does not reflect the quality of the adjudication process. It is a legitimacy issue. Although it is not possible to reflect every single ethnic and other minority group within society, it is legitimate to ask why certain large groups are not represented or not adequately represented on the Bench. It would be better if the Bench reasonably reflected identifiable segments of the population.

We have to have some flexibility, but I would agree with you that at the higher levels of the judiciary there is an inadequate representation of large identifiable minority groups within our society.

However, when we come to the question whether the quality of the adjudication process is affected by diversity or the lack of diversity, it becomes much less certain. Many distinguished legal commentators have contributed to this debate. For example, Professor Dame Hazel Genn of the Judicial Studies department in [University College London] has commented extensively on this subject. She has stated that there is simply no reliable empirical evidence that diversity in terms of women, or any particular ethnic group, leads to a better result in a judicial adjudication.

Now this is a fair point. I don't think she is saying it is not true [that diversity leads to a better adjudication outcome]. All she is saying, as I would expect from a distinguished academic, is where is the proof? She is certainly not saying 'don't increase diversity'. She certainly agrees with the legitimacy of it. We are talking about something rather different. Should we believe that a better result in an individual case would be produced by having a more diverse group of judges?

*Have there been any further studies done that examine the potential effectiveness of judicial diversity in the adjudication process?*

SIR TERENCE: There have been some studies on this in the United States, where the structure of the legal system makes it easier to conduct studies of this sort due to judges being political appointees. While controversial, those studies in the US do tend to indicate that having a more diverse panel does influence, if not the outcome, at least the quality of the ruling and its reasoning. For example, if you have three judges in the Court of Appeal, and two of them have a particular political or social outlook different from the third, the view of the third might not change the result, but may nevertheless focus attention on issues that the other two judges may not have thought about. What about this? How do you deal with that argument?

I believe that the process of questioning can by itself produce closer reasoning. It simply means that the other judges on the panel won't be able to overlook certain arguments. So the quality of the reasoning, where you have a dissenter or someone who is doubtful, can enhance the quality of the reasoning of the majority. As a result, I think that it is too unsophisticated to talk about diversity in the context simply of gender or ethnic background. What we are really talking about in the adjudicative process is the diversity of life experience.

Having said all of that, I do think that things have improved below the level of the High Court bench quite significantly. I believe that this is attributable to the work of the Judicial Appointments Commission which was set up by the Constitutional Reform Act 2005. Having that independent body does make a huge difference.

*Can you further elaborate on some of the issues that we must continue to address to improve diversity in the Judiciary?*

SIR TERENCE: It is commonly said that the problem, when you get to the higher levels of the judiciary, is that you are picking people from the front line of barristers. Unless, for example, you have a sufficient number of women or ethnic minorities at the QC level, you will have a very limited pool from which you can draw - assuming that they want to apply to be High Court judges.

We know that there are roughly equal numbers of men and women coming into the profession, as solicitors or barristers. As regards women, if they become pregnant and have a child, they will most likely come back to practice in view of their past efforts to get to the Bar in the first place and the difficulties they had to overcome to acquire a pupillage and a tenancy. But, if a female barrister has two children, it is really touch and go whether she will come back to the Bar or not. If she has three children, she will most likely never come back to the profession.

Obviously, we need strategies for trying to retain as many women as we can. The number of women coming to the Bar isn't an issue, but

it's the retention problem we need to address. We could go on for hours about this subject. To give you one example: If you are a young female barrister who has a criminal practice, you will be going from one Crown Court to another halfway across the country for very modest brief fees. Where are you going to put your child? What are you going to do? Even if you are in central London, you may not be able to fund the cost of child care.

These are the sort of issues we must continue to address.

*Would it be possible to pick judges from other areas, or from another pool? Traditionally judges are most commonly chosen from the pool of barristers. Do you believe that solicitors, for example, can be directly appointed to the Supreme Court of the UK?*

SIR TERENCE: [Justice of the Supreme Court] Lawrence Collins started off as a solicitor and eventually became head of litigation at Herbert Smith. He also edited *Dicey and Morris on Conflict of Laws* (now *Dicey, Morris and Collins on the Conflict of Laws*). In his career, he served as a QC, a Chancery judge, a Court of Appeal judge and was eventually appointed a Justice of the Supreme Court.

Despite this example, one of the points commonly made in the upper echelons of the judiciary, is that we cannot take people, such as academics, from outside the Bar. This argument is heard much more seldom in the US, and elsewhere. Unlike the United Kingdom, very few people in the US Supreme Court have been trial judges. But we don't have this practice here because of our tradition of advocacy. Should we directly appoint someone to the Supreme Court who has never conducted trial work or adjudicated in the Court of Appeal?

This is a controversial issue. And you will find many people will say that is not the proper way to do it.

*Speaking on the appointments process, can you elaborate for our readers your own experiences in being first appointed as High Court judge? How has the process evolved in the past few decades?*

SIR TERENCE: I am an openly gay man, and I was openly gay well before my appointment as a judge. I can attest from my own experiences that changes in the appointment processes, including the creation and work of the Judicial Appointments Commission, do make a difference. I'll give you a very small example of how the evolution of the system has made a huge difference for me.

Previously, until Lord Irvine became Lord Chancellor, there was no process of application to become a senior judge. Prior to that, the Lord Chancellor would consult with other senior judges and then ask if you would like to be a High Court judge. As a result, when people were first given the option of applying, it made a large difference. For the first time, those who wanted to be judges could force themselves on the consciousness of the people appointing them, who might not have heard of them before. I was actually one of the people who applied. In fact, I was one of the first.

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At that time, it was optional. They started by saying that, if you want to apply, you can or the Lord Chancellor will simply select you.

I did apply, and I am quite certain that if I had not had the opportunity to apply, I would never have been appointed. This is an example of how the process has made a huge difference.

*Do you believe that law, in general, and the legal system, has kept pace with the continued evolution of social values? On matters such as the freedom to wear headscarves in school, or same-sex marriage, this can be an especially contentious issue. What are your views on this?*

SIR TERENCE: The answer is in some cases it has and in some case it hasn't. Basically, for important changes in the law, you need to look to Parliament because it is the elected body. The government is elected on a manifesto. You would expect Parliament to formulate policies which reflect the needs and views of the day. Judges are not legislators. They are not elected. The judges apply legislation, either parliamentary legislation or regulation in the European context, and rulings of the Court of Justice of the European Union. Similarly, for example, under the Human Rights Act 1998, the judges have to take into account, but are not bound to follow decisions of the European Court of Human Rights in Strasbourg. So judges are not free agents in this.

Another factor, away from Europe and Parliament, are the constraints on evolution of the common law. The common law has been an unfolding set of legal principles. The nature of precedent means that you can only change the common law by small increments. Where there are new factual situations, not covered by precedent, judges sometimes respond by forming a view about society's values [that is to say the values of the legal construct – 'the reasonable man'] and applying them to the case. Usually judges apply existing precedent by analogy, extracting legal principles underlying relevant precedents and applying them to the new factual situation.

As a result, when the new situation is so different that judges are required to take a huge leap, they sometimes say 'sorry', this is for Parliament. They have to take a more conservative view. That is why people talk about judges changing the law incrementally—by small steps. But this is not to say that some judges are not bolder than others.

For example, in a very recent case, the Supreme Court said that it was not prepared to extend the principle of legal professional privilege to accountants and their clients because that will be too big of a step. Consequently, information between the accountants and their clients, for example in relation to tax advice, may have to be disclosed in court proceedings. On the other hand, discussion between

solicitors and their clients is considered to be privileged from disclosure in court proceedings.

By contrast, in the case *Stack v Dowden* [2007], Lady Hale persuaded her colleagues in the Supreme Court to have a new outlook on legal principles governing unmarried individuals. She was referring to those individuals who have lived together as a couple and, on their relationship breakdown, are in dispute as to how they should divide up their property. Of course, she still relied on precedent. But the leap was a big one. The Law Commission had done a report on this but Parliament hasn't stepped in to change the law. So, the House of Lords, as it was then, decided to step in. Different judges have different views on whether it is appropriate to make such a big leap or not.

*If we take a further look at the subject of gay rights, this is very much a social value still in its evolutionary stage. Have developments concerning this question been reflected in the legal system?*

SIR TERENCE: This is a good point. And for a long time, it wasn't. But, if you ask me as of today, I would say it has been. This is no doubt influenced to a large degree by Europe, and not just Strasbourg, but also the EU. The EU has issued a number of Directives which the UK has had to give effect through primary and secondary legislation dealing with rights in relations to sexuality, religion, gender, etc. without giving priority to any one of them over the others. This has definitely made a difference.

Indeed, there have been several cases decided by Strasbourg on appeal from UK courts on gay rights versus religious freedom. A notable example is *McFarlane v Relate Avon Ltd* [2010]. This case concerned a counsellor specialising in sex therapy who didn't want to treat same-sex couples. McFarlane was told he wouldn't be able to continue to practice unless he stopped excluding same-sex couples. Another is *Ladele v London Borough of Islington* [2009]. Ladele, a marriage registrar, was disciplined after she refused to conduct civil

partnership ceremonies. In both cases, their appeals were ultimately dismissed by Strasbourg.

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Gays in the military are another example. An appeal to Strasbourg was launched after the government refused to

accept gays in the military. The UK government, however, caved in before that case was even decided.

Most recently, there were two noteworthy appeals: one was from a gay man from the Cameroon, and another from a gay man from Iran. This was decided in 2010 by the Supreme Court [*HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010]]. The Supreme Court overturned the decision of the Court of Appeal, which had originally held that there are no grounds for asylum if persecution of gay men in the foreign county in question could be avoided by gay men acting discreetly. The Supreme Court, however, stated that everyone should be able to express their sexuality without fear of persecution. They should not have to hide their sexuality. Legitimate fear of persecution for being gay made them legitimate asylum seekers.

It was an amazing result. It was one of the few cases in living memory when a decision of our top court, previously the House of Lords now the Supreme Court, was applauded by those listening to the judgment being delivered. In my opinion, the EU, and Strasbourg, had a lot to do with this change in thinking.

*To conclude this interview, would you be able to share some advice for law students now entering the legal profession?*

SIR TERENCE: This question presupposes that law students will become practising barristers or solicitors. The question is ‘should they?’ There are many things that people with law degrees can do. You

don't necessary need to restrict yourselves to private practice, assuming that students want to qualify as a solicitor or a barrister.

I think that it is important to question whether becoming a barrister or a solicitor, in private practice is the necessarily the best thing for you. Would it be making the best of your talents?

There is a huge number of things that you can do. These things can be very interesting and have tremendous value. To name a few, you can go into

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government legal service, or the departments of state, which all need lawyers. Can you think of anything more fascinating than being a member of the legal team in the Foreign and Commonwealth Office?

In addition, there are local authorities and banks that require people with law degrees. You can also do volunteer work in the charity sector. Legal skills in themselves are extremely portable and they are extremely valuable. They are different from other skills. A truly expert lawyer to me is a person who can extract the real issue from a stack of paper, identifying the two critical documents. Simply speaking, they are asking the correct questions.

These analytical skills mean you can separate out the relevant from the irrelevant. And lawyers have this special skill to a very high degree. So I don't think people should be hung up on private practice. The world is their oyster. But if becoming a solicitor or barrister in private practice is what they want to do, then I have this advice: do not come to the Bar unless you have an absolute passion. It is irrational to come to the Bar if you do not.

Every year, huge numbers of people start the Bar Vocational and Training Course. However, we know that only about 300 to 400 will get pupilages and ever fewer will get tenancies. Pupillages are paid by the members of chambers and this inevitably leads to a limi-

tation of the number on offer. The chances of getting one are not good. That is why you have to be passionate about coming to the Bar. I think it is a wonderful profession, but it is tough to enter and to succeed.

So that is my best advice: come to the Bar if you really *really* want to do it. And consequently, don't think you are a failure if you don't get to where you thought you ought to be. You are not. That is how life is.

But I do think that being a practising lawyer is a great thing to be. Best of all, you can use your legal expertise to benefit society, such as by doing pro bono work. Or if you could one day become a judge and make a great contribution to society, resolving disputes between individuals and between the state or other public bodies and individuals after every other means of resolving the dispute has failed. It's a great responsibility, but a wonderful and very interesting thing to do.