

Human Rights, Equality and the Judiciary: An Interview with Baroness Hale of Richmond

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An outspoken advocate for gender equality, Baroness Hale became the first female Law Lord in 2004. She assumed duties as a Supreme Court justice in 2009, and was appointed as the court's first female deputy president in June 2013. Lady Hale has a background in academia where she taught for 18 years; she has also worked at the Law Commission, having spearheaded the Children Act 1989.

Lady Hale's continued dedication and contribution to human rights jurisprudence and gender equality have greatly shaped the English judicial system. Her efforts on behalf of justice and humanity are some examples of her outstanding achievements.

In this interview, Lady Hale speaks about the Human Rights Act 1998, the ECHR, as well as her career and how she benefited from both opportunity and hard work. We conclude our interview with advice that Lady Hale offers to all law students on overcoming barriers and making the best of openings that come along. She expresses the hope that students, and especially Birkbeck students, will think: 'If she can do it, I can do it too.'

THE BIRKBECK LAW REVIEW: *Lady Hale, thank you for agreeing to sit down with the Birkbeck Law Review.*

Can we begin by discussing your thoughts on the Human Rights Act 1998 (HRA 1998)? What are your thoughts on the importance of the Act and have we benefitted from its implementation?

THE RT. HON., THE BARONESS HALE OF RICHMOND: Certainly, from a judicial point of view, it is a benefit to be able to address the rights set out in the European Convention on Human Rights (ECHR) directly rather than having them come up in ordinary common law questions, where they do not arise directly. We could not consider them as they would be considered in Strasbourg. So the benefit for the judiciary, and indeed the United Kingdom, is that we can now look at the Convention rights and look at what Strasbourg would say about them in the particular case and give a reasoned judgement

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as to whether or not they have been violated.

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out the benefit of our reasoning. The Human Rights Act 1998 is good for us, good for Strasbourg, and to a certain extent good for the UK government as well. The UK has lost fewer cases in Strasbourg since the Act came into force (and it never lost very many). And of course, it is good for the people of the United Kingdom, who have the benefits of rights that were not positively protected in English law previously.

BBKLR: *There has been much discussion about repealing the HRA 1998 and revoking Britain's membership with the ECHR. If, as it were, the UK were to be taken out of the ECHR, what might its more immediate ramifications be for the judiciary? And what might be the other repercussions if the UK were required to leave the EU as a result?*

LADY HALE: If we were to be taken out of the ECHR, it would be an interesting question as to what the effect of the interim period would be - the period between having the ECHR and not having it on the law of the UK generally. I do not want to speculate too much. But I have not seen a proposal from government or Parliament that we

should pull out of the ECHR and put nothing in its place. The proposals have been that we should replace or supplement the ECHR with a British Bill of Rights, the suggestion being that the protection that it gave to those rights would be at least as good as the ECHR, but perhaps without the intervention of Strasbourg.

Instead of repealing the HRA, Parliament could amend it in many ways. They could amend section two, either to say that we have to follow Strasbourg decisions, or to say that we have to disregard them. They could amend section four, to give the judiciary the same power to disregard incompatible legislation as we have in EU law, or they could abolish declarations of incompatibility altogether. So, there are all sorts of changes Parliament could make while leaving the ECHR rights as rights under UK law.

One thing is clear: Parliament can enact a law that restricts its own power for as long as that law is in force. That is what the European Communities Act 1972 [ECA] did. It is what the European Union Act 2011 has done. It is not what the Human Rights Act 1998 does – that does not restrict the power of UK parliament in the way that EU law does. So to that extent, EU law is ‘entrenched’ for the time being, but the ECHR is not.

But the conventional view is that ‘Parliament can make and unmake any law’¹ and so Parliament can repeal the ECA 1972. And if Parliament repeals the ECA, of course, the courts will have to respect that. So there are ways in which a Charter or Bill of Rights could be entrenched, but under the conventional doctrine, it would be open to Parliament to ‘un-entrench’ them.

So it is not easy envision a situation like that in Canada. Canada has a written constitution; and once you have a written constitution, the powers of the federal parliament are constrained by that constitution. And you have to have a court with power to tell them what they can

¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn published 1915, Liberty Classics 1982) 3-4.

and cannot do. That is not the situation here. I will be long retired before we have any of that, if indeed we ever do.

BBKLR: Moving to the topic of equality in the judiciary. Every year fewer women are appointed to the judiciary, despite having higher graduation numbers than men. Why do you believe that there are so few women in the judiciary and the legal profession, particularly in higher positions?

LADY HALE: Gender equality on the bench is definitely improving. There is no doubt about that. You just have to look at the figures twenty years ago, ten years ago, and now. It is improving at almost all levels. The tribunals judiciary is the most diverse in terms of ethnicity,

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gender and professional background. That is partly because the tribunal judiciary consists mostly of part-timers. This makes it an attractive proposition for many people in a wide range of jobs, including academia, and people with domestic responsibilities.

District judges make up the next highest proportion of women and ethnic minorities, while for circuit judges, the numbers are fewer. For high court judges, the numbers are fewer still. In the Court of Appeal, the number of women is even fewer (and there are no ethnic minorities at all). Up here in the Supreme Court, there is still only me. So, the higher you go up in the judiciary the less diverse it becomes.

But to a very large extent, it is because of the divided legal profession and the traditional assumptions about who should become what sort of a judge. Although those assumptions are breaking down to some extent, it is still by and large the top QCs who become high court judges. Currently, only 12 percent of practising QCs are women and it has only reached as much as that very recently

The number of women qualifying as barristers is similar to the number of men. However, I am not sure how many women get pupillages. Then the question is how many of them get tenancies and in what sort of chambers, for these are important factors in determining

whether they become judges. And having got a tenancy, what sort of practice do they develop? This depends a lot upon the clerks, upon the solicitors who traditionally instruct those chambers, upon your colleagues, as well as on your own merit.

Therefore, we find that the proportion of women at the bar drops off as they get more senior, because of all the different factors impacting on practice. In most areas of practice, especially a busy common law practice, domestic responsibilities also create problems because, as you know, traditionally the bar consists of sole practitioners. Barristers cannot make a profit out of anybody else's work, unlike partners who can share profits and delegate a lot of tasks to employees. Barristers' practice is almost entirely dependent upon their own capacity.

Chambers are now better at enabling barristers to balance their personal and professional lives but it is still very difficult. Unless you are prepared to take time away from your other responsibilities or have a practice which you can control, it can be very difficult. You may be in court all the time or getting a brief at 6 o'clock in the evening to go off to the Southend County Court the next morning.

So all of those sorts of reasons, coupled with the fact that some women are quite shy about putting themselves forward and recognizing their own merits have also made it difficult for women to rise to the higher levels of the judiciary. I think we are getting better at it, but there is still a perception that women are not as good at blowing their own trumpets as men are; therefore, they do not see themselves qualified for certain positions, which the men take for granted.

Furthermore, there have been educational inequalities in the UK. People who have been privately educated are more likely to go the Oxford or Cambridge. These people are disproportionately represented at the bar and also in the 'magic circle' firms of solicitors, although solicitors' firms do recruit from the places they perceive to be good, which includes a range of other universities as well. I think it is still the case that there are more men than women being educated at top public schools and certainly more men than women being educated at Oxford and Cambridge. But things have changed a lot

since I was at Cambridge. Then there were only three women's colleges and twenty one men's colleges. So the discrimination was overt, but it's not overt anymore because the colleges are all mixed (apart from the two women's colleges).

I do disagree with my colleague, Lord Sumption, who said that we will not get gender equality on the bench for fifty years unless there is positive discrimination. Instead, I believe that addressing all the things I have mentioned earlier (and some others) could make a big difference. I have, however, raised the question whether it should be possible, when recruiting for the bench, to consider the gender and ethnic balance of the bench as part of the 'merit' criterion, which Lord Bingham thought it to be.

BBKLR: *As a result, would you say that gender barriers are gradually being removed?*

LADY HALE: Yes, but I think the challenges remain. I have at least demonstrated, and as have the women in the Court of Appeal, that women can be appointed. But that should not be a surprise. It is al-

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ways gratifying to be the first woman. But I think it is often more difficult to be the second. And to some extent, how difficult that is depends a lot on the first.

I do not think my generation of women are the sort to get there and pull up the drawbridge behind them. I would dearly love more senior women judges in the judiciary and everything that I can do towards that I am doing. However, it is proving quite difficult to acquire critical mass. It is quite striking. We are half the human race. We are half the good graduates, at least. So something must be going wrong.

BBKLR: *There has been much debate about the merits of diversifying the Bench and if it will make any difference. What are your thoughts on this?*

LADY HALE: Well, I think the main reason for wanting a more diverse bench is to make it more legitimate. It does not seem to be right in principle that the legal rights of people, the criminal liability of people, and the law of the land, are being decided by a very small section of society. The work we do, we are doing for the sake of all the people of the UK. The people of the UK are generally a more diverse bunch than the bench. So I think that is the main argument. The desirability of having a more diverse bench is that people who come to court should not feel that they are adjudicated upon by an alien species. This is quite important.

Whether having a more diverse bench makes a difference to the actual decisions is a more debatable question. If you were a judge, would you decide cases any differently because of your nationality or ethnicity? I do not know. But there might be the odd case in which you would have a different perspective, because every judge brings their own experience of life to the business of judging, together with the values which they have had all their lives or have developed as a result of their experience of life. And especially, in the higher courts where collective decisions are made, it is very important.

The greater the variety of perspectives that we can come from, when tossing around a difficult question, the better. And yes, there will be occasions where it does make a difference.

BBKLR: *As we all know, your background is in academia. Do you feel that it has had an impact on how you arrive at your decisions?*

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LADY HALE: It may make a difference on some things but not on many other things. I think, on children matters, the fact that I spent a lot of my academic career reading, thinking and researching about children's issues probably does have an impact. Unlike some of my colleagues, I am closer to the range of arguments about some issues without having to

rely solely on the papers in the case. Of course, that is quite a tricky issue for judges: how much do you rely on your own background knowledge and how much do you confine yourself to the papers in the case? It probably does have some impact in some areas.

BBKLR: *Lastly, we would like to ask you what advice you would give individuals who are pursuing the legal profession. Do you think it is more difficult now than before to get into the profession?*

LADY HALE: I think it is undoubtedly the case that it is more challenging to get into the legal profession now compared to when I studied law. When I was studying law, we were a very small proportion of University students. And only a very small proportion of the population went to university. So, there were nothing like so many law students.

Then there was a perception that going to bar was difficult and that you needed money and contacts. It was not actually the case. Most people who went to the bar in the late 1960s and early 1970s did very nicely, because at that stage the amount of work for the bar was expanding rapidly—more rapidly than the number of people at the bar. Whereas now, there is limited work, both for barristers and for solicitors, because of the reductions in public funding. The supply of work is going down while the supply of people who are qualified to do it is going up. Yes, it is more difficult now than it has been at any stage in my professional lifetime—I am sorry to say, but it would be foolish not to acknowledge it.

I always have done two things: one is to take advantage of any opportunities that come my way and the other is to do my best at them. I have tried not to say to myself, ‘oh, I couldn’t do that.’ Rather, I try to say to myself, ‘oh, I could do that.’ However, I was extremely fortunate that opportunities came my way. I was at the right places at the right times. I have been extremely lucky. So obviously, if people are asking can it be done, I hope they can look at me and say, ‘Well, if she could do it, of course, I can do it.’

I am different from most of colleagues and not only from all of them in being a woman. I am not privately educated and I did not make my name as a barrister. I made my name in other ways. I think it is

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important that judges are recruited from people who have done stuff other than judging.

But I do not think you have to be a top barrister in order to be a top judge. I do not think that is necessary. I do not even think it is necessary to be a top litigator in order to be a top judge.

I am also a wife, a mother and a grandmother. But one of the reasons why I was able to make the name I did for myself was that I was an academic, which meant that I could organize my timetable and be at home quite a lot. Of course, we did have a daily nanny. But other than that, I could work at home a lot. My daughter talks about remembering going to sleep to the sound of my typewriter. So yes, I hope that students, especially Birkbeck students, will think that heaven sake, if she could do it, I can do it.

One thing you have to be aware of is that you must have a strategy, for overcoming barriers or for getting around them. As I said earlier, take all the jolly opportunities that come along and make the best of them you can. It is more fun that way.

