

## Radio Ombudsman #22: Baroness Hale of Richmond on blazing a trail and balancing objectivity with empathy in the courtroom

Baroness Hale of Richmond talks about her esteemed legal career and role as President of the Supreme Court. She explains how balancing objectivity with empathy is vital in her profession, and why diversity and inclusion begins with asking the right questions.

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**Rob Behrens:** We've had some first-rate guests in our time, but Baroness Hale of Richmond is in a category of excellence all on her own. In a stunning career, she taught law at Manchester University, qualified and practised as a barrister, specialised in family and social welfare law, and was Founding Editor of the journal of that name. She was also a founding member of the Human Fertilisation and Embryo Authority.

She was the first woman to be appointed to the Law Commission. She became a High Court judge, the second woman to be promoted to the Court of Appeal, and then she became the first woman Law Lord. She became the first woman justice of the Supreme Court, and President of the Supreme Court between 2017 and 2020.

As many of you will know, in September 2019 in this position, Lady Hale declared the Prime Minister's suspension of Parliament as unlawful, a ruling she described as, "A source of not pride, but satisfaction." For all her achievements and fame, Lady Hale is known for her accessibility and rejection of pomposity. Lady Hale, thank you very much for joining us. You're warmly welcome. Your participation is eagerly anticipated by everyone at PHSO in the conference today.

**Baroness Hale:** Thank you very much indeed for the invitation. It's a pleasure to be with you all.

**Rob Behrens:** Thank you. Now we've talked to our colleagues about what they want to ask you. And many of my colleagues want to know what qualities you regard as important in rising through the ranks of what is a heavily male-dominated profession, and how you countered stereotyping and discrimination.

**Baroness Hale:** That's a very interesting question because it's not one that's easy to answer from a subjective point of view. Others may observe how I have behaved and attributed to trying to make headway in a heavily male-dominated profession, but actually I suspect that I just carried on regardless.

I was a bit oblivious to the fact that everybody around me was male, especially in the early days of my career. I was a bit oblivious to any possible discrimination which I suffered. I just carried on. I think that is the only thing to do, for anybody who fears that they may be suffering discrimination.

There obviously was some discrimination, and there certainly is stereotyping. People imagine that men have a career pattern and women have a completely different career pattern, but I was fortunate enough to be in academia for the first 18 years of my professional life. Academia is much less stereotyping than the standard independent legal profession, and so perhaps that helped, as well.

**Rob Behrens:** Thank you.

**Baroness Hale:** “Don’t let the bastards grind you down,” is what I always say.

**Rob Behrens:** Okay, that point is well made. On reflection, what more might be done to promote inclusivity and greater representation in administrative justice systems, from your perspective?

**Baroness Hale:** Umm... while number one is to recognise that inclusion and diversity are important for their own sake. In the judiciary, that has probably only been recognised in this century. I think in the public sector generally, and the public service, of which you are a part, it has been recognised for a great deal longer.

And forgive me, I don't think that the ombudsman sector is quite as heavily male dominated, or as stereotypical, as the ordinary legal profession and judiciary are. So, the first thing is to recognise that diversity and inclusion are a good thing for their own sake.

Once you realise that, you can start to ask yourself: “Why aren't we more diverse? What are the stumbling blocks to having more women, more ethnic minorities, more disabled people?” and so on and so forth.

Once you start asking yourself that question, you can usually find out some answers, and, once you find out the answers to that, you can start trying to tackle them. I could go on forever about this. It's a very large subject, but, as I say, asking yourself the right questions is the beginning of finding the right answers.

**Rob Behrens:** Thank you. Having an inquiring mind and being sceptical, I think, is very important. I'm the first male ombudsman for nearly 20 years, so that is encouraging. Probably, my successor won't be.

**Baroness Hale:** Yes. (Laughter)

**Rob Behrens:** Could we just move on? Can I say that our caseworkers regularly have to make very difficult decisions, often in cases of bereavement in the health service, where babies die tragically? They're under pressure, and they make decisions that people may be very disappointed by because of the lack of evidence in particular situations. Could you give us a couple of examples of complex and challenging decisions that you've had to make in your career?

**Baroness Hale:** Of course, I have been both a trial judge and, for a large part of my career as a judge, an appellate judge. And there's all the difference in the world between being a first-instance decision-maker and being an appellate decision-maker, and probably the most challenging cases that I had to decide, in the sense in which you're describing them, were when I was a trial judge in the family division.

I was having to decide, a lot of the time, whether to take children away from their parents. Of course, the parents were going to be gravely upset and disappointed if you decided against them, and it was usually the less risky thing to decide against them.

So one of the most difficult things as a family trial judge is learning how and when to take risks, because I think we had protection, which the social workers didn't have. The social workers, like the prosecutors, have to put the case before the court, but it is for the court to decide what the right solution is, and not simply to rubber-stamp the decisions that they have taken. So, those were, unquestionably, the most difficult and challenging in the sense of trying to persuade a very disappointed person that this was the right answer.

In appeals, of course, it's different. Somebody else has found the facts, (Laughter) and decided where the evidence lies and so on. We're just deciding what the law is, but possibly the two most challenging appellate decisions that I can think of, but there were loads - they're all difficult; every case in the Supreme Court involves an arguable point of law of general public importance - one was the Montgomery case.

This was a clinical negligence case in which a mother, a pregnant woman who was a small-framed woman, she was an insulin-dependent diabetic, as a result of which, of course, she was having a large baby. She was not warned of the dangers of a small diabetic woman having a large baby, and in particular the risk of shoulder dystocia.

Shoulder dystocia is when the baby's shoulders get stuck after the head has gone down the birth canal. It is a major obstetric emergency. She was not warned of that, and she was not offered the choice of having a Caesarean, with the pros and cons of that, as against a vaginal delivery, being properly explained to her.

And, it was tricky because we had to revisit the previous law on informed consent to medical treatment, which we did, but it was also tricky because my male colleagues were, when it

came to causation, quite largely focused on the risks to the baby. Actually, the risks to the baby of the sort of catastrophic brain injury that this baby suffered are comparatively small, but the risks of having shoulder dystocia were not small.

Of course, these are risks to the mother and her whole experience of giving birth. To get them to focus on the risks to the mother, as well as the risks to the child, was quite a challenge. But I am very proud of how that decision turned out, because it recognised patients as people, with their own values and their own choices to make, rather than having to be dependent upon the values and choices which their medical advisors made. I think we've learnt a lot from that case. So, that's one example relevant to the work of the Health Service Ombudsman, which is why I'm mentioning it.

The other example, of course, was the prorogation case, but that was mainly a challenge because of the huge speed with which it had to be done. There was no point in our hearing the case if we couldn't do it extremely quickly. There would have been no point in our deciding that the prorogation - the advice to Her Majesty - was unlawful, if we did so weeks after Parliament was coming back anyway.

The other point about it was we had a decision in England that the prorogation could not be challenged in court, and a decision in Scotland that the prorogation could be challenged in court, and was null and void, which meant that Parliament had not been prorogued. They couldn't both be right. There's only one Parliament. (Laughter) So, we had to decide between those two extreme positions. We were able to do so in a remarkably quick time, and we were unanimous.

Andso, that was an extraordinary challenge to achieve all of that in such a short amount of time, but it wasn't my achievement. It was a collective endeavour, which is why I always say that it was a satisfying case, not because there's any satisfaction in finding that anybody in government or public service has acted unlawfully. The satisfaction is the fact that we managed to do it in double-quick time, and we managed to be unanimous about it.

**Rob Behrens:** Thank you.

**Baroness Hale:** A long answer, but it's an interesting question.

**Rob Behrens:** It's quite chastening that you mention this in the week that the Ockenden Report has published its first findings in baby deaths in Shrewsbury and that these kinds of tragedies go on, and on, and on, in a way that we haven't found a way of stopping. But let me just link the two examples together and ask you about any emotional stress associated with having to make decisions in those circumstances. Is that something you factor in, or does it come with the territory of having been a judge for a long time?

**Baroness Hale:** It probably comes with the territory of having been a judge for a long time. As I said right at the beginning, the emotional pressure is much greater when you're the first-instance judge, which, of course, your caseworkers are the first-instance judge.

Of course, we are not dealing with it on the papers as first-instance judges. We're dealing with it in a hearing, when the people are there in front of us. We can see them. We can see how they're reacting to the evidence as it comes out. The emotional tension in a family courtroom is very high indeed and so you do have to learn to cope with it.

I hope it's not hardening one's heart, because you have to retain empathy for what the people in front of you are going through. It's not only the parents who are going through things. The social workers, the doctors are also going through quite an emotional time, but they are professionals and so it's easier for them. But, as judges, we are professionals, so we have to learn to combine a degree of objectivity and empathy. It's alright. It can be done. You could do it.

**Rob Behrens:** It's very interesting. We're beginning to move into the area of mediation between the parties, which involves this kind of face-to-face engagement. That requires much more emotional intelligence from case handlers than would be the case if they were just looking at the papers, but I think it's a good discipline, so it's interesting to hear you say that.

**Baroness Hale:** It undoubtedly is. As an appellate judge, all you're doing is reading the papers. The people may be in the courtroom, but you're not hearing them give evidence. There is nothing like hearing somebody give evidence to understand how they feel about a whole situation.

**Rob Behrens:** In the second case, what was different about that was that you became a media star on the front page of tabloid



newspapers for a period. And you were put under great pressure by people in the political sphere. Did that have an impact on you, or do you just disregard all of that?

**Baroness Hale:** Well, I was very surprised at the level of interest in the case, which was all over the common-law world, the Anglo-American common-law world. They had been watching this with huge interest and concern because of their belief that this was a very significant case for the rule of law and the constitutionalism of the way in which not only the United Kingdom was governed but also other parts of the Commonwealth in particular.

So, I was surprised at how much interest there was in the case. I was even more surprised of the huge interest that my spider brooch provoked. (Laughter) I've always worn brooches. I hadn't chosen a spider deliberately. It just happened to be there, and it happened to provoke a lot of interest.

But, as a judge, you have to be ready for the people who don't like your decisions, to protest about them. As long as they do so in a reasonable and understanding way, that is fine, but it's not fine, of course, if they do so in a way that brings the whole system into disrepute. That shouldn't happen. You will have to face the same sort of thing. The public authorities that you have to find against don't like it, do they?

**Rob Behrens:** They don't, and the complainants don't like it, either.

**Baroness Hale:** No.

**Rob Behrens:** I've always said that the one thing you mustn't want, as an ombudsman, is to be loved by anybody. I'm sure that's probably true of judges, as well.

**Baroness Hale:** No, I think one of the difficulties is, of course, that, for just exactly that reason, judges tend to be mainly friendly with other judges - and, perhaps, other senior members of the legal profession, which is one of the things that we have in this country. There are a lot of links between the senior members of the legal profession and the judiciary, but that's where we tend to have our closest friendships, on the whole, because (Laughter) we don't want to appear to be overfriendly to one side or the other of any particular debate that crops up.

**Rob Behrens:** Okay, thank you. Now your late husband was, himself, the Pensions Ombudsman, which is the only ombudsman in the UK with binding powers. I'm struck by how un-joined up the administrative justice system is in relations between the courts, tribunals, and ombudsmen. So, I wondered if you had any reflections on the current role of the Ombudsman and how we can make the institution more central and relevant to citizens.

**Baroness Hale:** I think that's something which I probably shouldn't pontificate about. Of course, Julian was the Pensions Ombudsman, which is a statutory role, but it is basically a private-sector role

because, although the pension schemes that he dealt with were, quite a lot of them, in the public sector, he dealt with all occupational pensions.

Basically, it was a question of disputes between the scheme and the member of the scheme, so it was a private law system, very different from yours, which is a public law system. In a private law system, there is no particular objection to an ombudsman having the power to make binding orders, as long as there is an appellate route, as there was from him into the ordinary courts.

There was a big debate between him and the ordinary courts because his statute said that he was allowed to make decisions that were just and fair - or fair, just, and equitable - which was intended to give him the broader powers that you have to decide questions not in strict accordance with the law. So, that's how he interpreted it.

The courts, of course, were used to dealing with things strictly in accordance with the law, and there was a considerable tension throughout his tenure there about that. That is a problem, I think, a tension that, in a way, you shouldn't have, but the price that you have to pay for being able to make decisions that are not strictly in accordance with the law is that your decisions are only recommendations and not binding. You might have to wonder which you would prefer, frankly. I think that, of course, the best would be to have both, as, indeed, Julian did, but there we go.

Before that, he was Insurance Ombudsman, which was a non-statutory but similarly private-sector role and is now the Financial Services Ombudsman. So, it has become a statutory thing, but again those bodies, the ones in the private sector do have different challenges from the ones that you have.

(Laughter) You all have challenges, but they are of a different nature.

**Rob Behrens:** I'm looking at the mess that the South African Public Protector is getting in, having binding powers. I certainly don't want to have that responsibility. We need to finish. I would love to go on, but time is limited. Could we just end by asking you how you've coped with the personal challenges of resilience during the pandemic?

**Baroness Hale:** Of course, I retired in January and so it was not a huge challenge to retire to North Yorkshire, from where I am speaking to you now, and the pleasures of beautiful countryside, beautiful house, beautiful garden, and settle down to write my memoirs.

So that was quite an easy way to get through the first lockdown. Now we have all learnt to meet one another remotely on Zoom. In fact, one can meet many more people as a result, so there are lots to be grateful for, but I'm sure that we all would like to get back to something more like normality in the course of next year.

**Rob Behrens:** Absolutely, and all of us will be going out to buy your autobiography when it comes out. Do you know when that's going to be next year?

**Baroness Hale:** Sometime next year, yes. I can't give you more information than that. In the latter half of next year, I think.

**Rob Behrens:** Okay. Look, thank you so much. It has been an absolute privilege and pleasure to talk to you. On behalf of all my colleagues, I wish you well. Seasonal greetings and very great thanks for what you've done. Thank you.

**Baroness Hale:** Thank you, and seasonal greetings to all of you, too. Goodbye.