

JUDICIAL APPOINTMENTS

BALANCING INDEPENDENCE, ACCOUNTABILITY AND LEGITIMACY

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This collection of essays had its genesis in a seminar organised by the Judicial Appointments Commission at the Canadian High Commission and attended by a range of commentators from United Kingdom jurisdictions.

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Foreword

This is an informative and stimulating, indeed a wonderful book. In effect it is a series of readable essays which provides a comprehensive analysis of the recent history of our judicial appointments system as well as offering careful reflections on the impact of the Constitutional Reform Act 2005 on these arrangements.

In the context of judicial appointments, words like ‘merit’ and ‘independence’ and ‘diversity’ are frequently used in discussion or in argument. We are, of course, all sure that our judiciary should be independent and as diverse as possible, and appointed on merit. However, the words themselves convey different meanings to different individuals and sometimes embrace differences of approach to these concepts. The essays in this book address such sensitive and difficult issues, as the writers discuss them in language which is clear, unequivocal, and does not obscure what the writer means.

As I read the book I became increasingly aware that it would stand as a fine tribute to the leadership of Usha Prashar, as the first Chairman of the Judicial Appointments Commission, established following the implementation of the Constitutional Reform Act 2005. From the first moment when she accepted the onerous responsibility until her period in office came to an end, she stood resolutely for the principle that every single candidate for judicial appointment, whoever he or she was, whatever his or her background, and gender, education, racial origin, faith or sexual orientation, should be treated equally and identically throughout every stage in the process, that the task of the Commission was to identify the best candidate or candidates for the particular appointment under consideration, and that the process should be transparent, and that the Commission should

be accountable for every decision: nothing more and certainly never anything less. Her steady adherence to these principles required great natural independence of spirit. Time and time again her belief in the independence of the judiciary, and the independence of the Judicial Appointments Commission itself was demonstrated. Her endeavours have commanded the respect and admiration of all who have had to deal with her.

These principles she espoused, as the essays show, are constant. It would, as the essay from Graham Gee, *The Politics of Judicial Appointments in Canada*—a different country with a different history—serves to underline, be unwise ever to take them for granted.

I should further record my gratitude, and I have no doubt, too, the gratitude of all who read this book to the legal professions, The Bar Council, The Law Society, and ILEX, for agreeing to support it.

A handwritten signature in black ink that reads "Lord Judge". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Lord Judge

Lord Chief Justice of England and Wales

The Growing International Consensus in Favour of Independent Judicial Appointment Commissions

Professor Jeffrey Jowell QC

Jeffrey Jowell is Professor of Law at University College London, a practising member of Blackstone Chambers and the UK's member on the Council of Europe's Commission for Democracy Through Law ('The Venice Commission'). He is the Director-designate of the new Bingham Centre for the Rule of Law.

In April 2010, the first appointment was made to the UK's new Supreme Court. The interest of the press in the event was as scant as the coverage it gave to the retirement of the eminent judge whom the new appointee replaced. At about the same time, in the United States, the resignation of a long-standing Supreme Court justice evoked a torrent of press comment on his judicial life and philosophy, accompanied by lively speculation on the identity and character of his likely successor.

The legal correspondent of *The Guardian* noted these events¹ and wondered whether our change in procedures of judicial appointment in 2005 to a system of the independent Judicial Appointments Commission was worthwhile since it had not caused any greater interest in our top judges.

By contrast, the leading legal correspondent of the *New York Times* asked whether the time had not come to move away

¹ Afua Hirsh "What's the verdict on our new Supreme Court", *The Guardian* April 11, 2010.

from the US Supreme Court's 'cult of celebrity', where judicial appointments had become the sites of political battle².

In the UK, prior to the Constitutional Reform Act 2005, judges were appointed by a politician, the Lord Chancellor, after 'secret soundings' had taken place within the legal community, without any opportunity for wider assessment of a candidate's record or predilections. Nowadays a much more open procedure exists (as is described in the other chapters)—yet it is not as open as the system in the United States, where the President nominates a candidate whom the Senate then scrutinises in a process which invites the application of party political preference in the judicial appointments process.

Are all or any of these systems of appointment permissible in a democracy properly so-called? Or are some systems more democratic than others? Is the rule of law enhanced by one system or another? Which system better furthers judicial independence? Is there a body of international (particularly European) guidance to point us in one direction or another?

Three models of judicial appointment

There are basically three models of judicial appointment procedures, each with its own benefits and defects. Each model of course has its own variants, but let's set them out now, and then consider to what extent European standards endorse one or other of them:

Executive appointment

This model entails appointment by the executive (normally the equivalent of a minister of justice, or head of government) without parliamentary involvement or the involvement of a judicial appointments commission. It is normally conducted

2 Linda Greenhouse "American (Judicial) Idol" *New York Times*, April 24, 2010. Citing C. Lerner and N.Lund, "Judicial Duty and the Supreme Court's Cult of Celebrity", George Mason University Law and Economics Research Paper Series 09-61.

by means of discreet professional soundings from within the legal establishment, especially from judges before whom the candidate has appeared.

When conducted within a culture of integrity, this model has the advantage of providing reliable information about the technical legal quality of candidates. However, it can too easily perpetuate existing social biases and ignore applicants from non-conventional backgrounds or from a career which involved few court appearances. It may also be unsuitable for a judiciary which decides matters which verge on the political, as is the case when judging bills of rights. Such judgments, it is argued, require qualities such as social sensitivity or political sagacity—qualities which are not best assessed by the legal establishment alone. This closed system also makes no effort to elicit the support for the appointments of members of the legislature, whose laws the appointee will eventually review.

The principal disadvantage of this model is that, however impartial the appointees are in practice, a perception of bias is raised by the fact that the appointment is made by a government minister in the absence of open and transparent procedures. Ultimately, therefore, the process of executive appointment offends the principle of separation of powers and the perception of judicial independence.

Legislative approval

This model involves the approval of a candidate by a legislative body, such as the Senate in the USA (for appointments to the Supreme Court) or either House of the Federal Parliament in Germany (for appointments to the German Constitutional Court). In the USA, the candidate is nominated by the President, while in Germany the nomination is made by political parties. In the USA a bare majority of the Senate is required for confirmation, while in Germany a two-thirds majority is required.

This model seeks to legitimise the judicial appointments process, particularly by enlisting the support of the legislature, whose laws the judge will have the power to review or strike down. However, in the USA the role of political actors in the nomination and approval system has politicised the appointments process to the extent that judges rarely oppose outcomes that are philosophically in accordance with the party which nominated and confirmed them. In Germany, any perception of bias induced by the involvement of political parties in the nomination process is somewhat diluted by the fact that a two-thirds majority is required for the approval of a candidate. The need therefore for a strong degree of consensus about the candidate provides an incentive to make less ‘ideological’ appointments.

Nevertheless, the process as a whole retains the perception that judges, to be approved, will feel bound, in future judgments, to satisfy their political appointers of their ideological reliability.

Judicial appointment commissions

The advantage of a commission model in terms of perceived independence of the judiciary is clear, particularly where the commission’s composition is dominated by non-politicians (as is the case in the UK but not, for example, in South Africa, where the Judicial Services Commission is composed of 15 politicians and only eight lawyers). In addition, the commission can be charged with positively seeking to enhance the legitimacy of the judiciary, for example by taking steps to widen the pool of potential appointees (as in South Africa, where s.174 of the Constitution of 1996 provides the “need for the judiciary to reflect broadly the racial and gender composition of South Africa”).

Although the ultimate appointment under this model is almost universally made by the executive, there is limited discretion to depart from the list provided by the commission. The commission is therefore wholly (as in the UK) or

relatively (as in South Africa) independent of the executive and parliament. The requirements of the separation of powers and judicial independence at the appointments stage are thus met to a greater extent than under the first two models.

International guidance

The structures of democracy have been under sharp scrutiny recently as so many countries have shed their tyrannical pasts and have had to engage in the exercise of defining the extent to which democratic absolutes exist. International norms on human rights have existed since the UN Universal Declaration of Human Rights in 1948, followed by the International Covenant of Civil and Political Rights 1966 and the European Convention on Human Rights 1950. The absolute features of democracy include universal franchise, equality, free speech, the right to life and other accepted civil and political rights, some of which may be limited, for example, so as to counter terrorism. Yet there are other features which may be regarded as optional or contingent, depending upon the particular country's history, culture and traditions. In that category fall the role of the head of state (presidential or prime-ministerial), voting systems (first-past-the-post or proportional representation) and rights such as environmental rights, the right to administrative justice and socio-economic rights.

Judicial independence is clearly a core and non-negotiable feature of any proper democracy. Yet the mechanisms of such independence, particularly through the appointments process, have not until recently received sufficient attention. By and large, the issue has been subsumed under the very general provisions of Article 10 of the Universal Declaration of Human Rights:

“Everyone is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

Article 6 of the European Convention on Human Rights is in similar terms:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

The case-law of the European Court of Human Rights does not specifically treat judicial appointments in a systematic way, and therefore we must look to other bodies to set out more specific standards, such as those in the Council of Europe, including its Commission on Democracy Through Law (“The Venice Commission”).

The most authoritative initial text on the independence of the judiciary at the European level is Recommendation (94)12 of the Council of Europe’s Committee of Ministers on *The Independence, Efficiency and Role of Judges*. That text, however, does not go into much detail and is currently under review. A more comprehensive text is Opinion No. 1 of the Consultative Council of European Judges (CCJE) on *Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*.³ This has now been brought up to date by the Venice Commission’s report adopted in March 2010, *On the Independence*

3 Other Opinions of the CCJE are also relevant in this context, e.g. CCJE Opinions No. 6 on Fair Trial within a Reasonable Time, no. 10 on The Judiciary in the Service of Society and No. 11 on the Quality of Judicial Decisions. Another Council of Europe text is the European Charter on the Status of Judges, which was approved at a multilateral meeting organised by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998. The Venice Commission’s Report on Judicial Appointments (CDL-AD(2007)028) covers issues of particular importance for judicial independence. Other aspects are dealt with in various Venice Commission opinions during that body’s course of advising individual countries. The United Nations has also given some guidance on judicial independence, such as Basic Principles on the Independence of the Judiciary endorsed by the United Nations General Assembly in 1985 and the Bangalore Principles of Judicial Conduct of 2002. These standards often coincide with the Council of Europe standards but usually do not go beyond them.

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of the judicial System. Part 1: The Independence of Judges ⁴ (“The Venice Commission’s report”).

The Venice Commission’s report begins by noting that most countries with codified constitutions endorse the independence of the judiciary. It mentions that the UK has a parallel provision through s.3 of the Constitutional Reform Act 2005 which provides that all government ministers with responsibility for the judiciary “must uphold the continued independence of the judiciary”. It remarks that the independence of the judiciary is a vital democratic component, which has both an objective and subjective component. The objective component addresses the “indispensable quality of the judiciary as such”, while the subjective component addresses the “right of the individual to have his/her rights and freedoms determined by an independent judge”. The two components together “enable judges to fulfil their role of guardians of the rights and freedoms of people” (paragraph 6).

Basis of appointment or promotion

Both Recommendation (94)12 of the Committee of Ministers and the Opinion of the Consultative Council provide that all decisions on judicial appointments and promotions should be based on published criteria, ensuring the decisions are “based on merit, having regard to qualifications, integrity, ability and efficiency” (paragraph 25). The Venice Commission report is more nuanced, providing that, although merit is the ‘primary criterion’:

“Merit is not solely a matter of legal knowledge analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgements, etc.” (paragraph 24).

The Venice Commission report then goes a step further than others to date, endorsing diversity not as a goal in itself, but to

4 Part II, on the independence of prosecutors, is being considered by the Venice Commission at present.

further both judicial legitimacy and equality of opportunity. Paragraph 26 provides that:

“Diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society”.

The appointing and consultative bodies

Recommendation (94)12 of the Committee of Ministers reflected a preference for judges to be appointed by an independent judicial council, but was sufficiently relativistic to accept other systems, provided that:

“The authority taking the decision on the selection and career of judges should be independent of the government and administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority itself decides on its procedural rules.”

The Consultative Council also argued in favour of the involvement of an *independent appointment body* (paragraph 45) which it considered “particularly important for countries which do not have other long-entrenched and democratically proved systems.”

Opinion No. 10 of the CCJE, *The Council of the Judiciary in the service of society* further develops that position, providing, (at paragraph 16):

“The Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided.”

And (at paragraph 19):

“In the CCJE’s view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the

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judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of Parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.”

A previous report of the Venice Commission (CDL-AD (2007) 028) was more tolerant, providing (at paragraph 44) that:

“In Europe, a variety of different systems for judicial appointments exist and that there is not a single model that would apply to all countries.”

Nevertheless, the Commission at that time favoured a judicial appointments council as the best guarantee of judicial independence.

In its latest (2010) report, the Venice Commission seems to be somewhat less tolerant of anything other than an independent appointments commission. In paragraph 16 it says that:

“While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.”

Conclusions

There will always be those who will hark back to the days of judicial appointment through the executive, confident of its ability to flush out the highest quality candidates by means of secret, but reliable soundings from within the closed world of the immediate participants of the judicial system. A return to such procedures is unlikely to be accepted in today’s culture of

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transparency and because of the defects of the closed system discussed above.

Others will advocate the widening of the approval process to Parliament as a means of enhancing the legitimacy of 'unelected judges'. Such a development may well make our judges better known in the media, but we must consider long and hard whether we wish to encourage the toxic confirmation struggles, leading to a culture of 'judicial celebrity' that are now being seriously questioned, even in the United States.

While up until recently democracies tolerated a wide variety of method of judicial appointment, it is increasingly being accepted that judicial independence is compromised by a system that confers undue power of appointment upon either the executive or the legislature. Growing international guidelines are therefore insisting that an independent judicial appointments commission is more effective than any other model to achieve the democratic imperatives of judicial independence and the rule of law.

Selection of Judges Prior to the Establishment of the Judicial Appointments Commission in 2006

Lord Mackay of Clashfern KT

Prepared with the assistance of David Staff

Lord Mackay was appointed Queen's Counsel in 1965 and held the office of Sheriff Principal, Renfrew and Argyll, from 1972 to 1974. He was appointed Lord Advocate, the senior law officer in Scotland in 1979 and a judge of the Supreme Courts of Scotland in 1984. In 1985, he became a Lord of Appeal in Ordinary. In 1987 he succeeded Lord Havers as Lord Chancellor and held the office for 10 years. He is currently the Editor-in-Chief of Halsbury's Laws of England and Lord Clerk Register.

In the years between 1987 and 1997, while I was Lord Chancellor, judicial appointments were still seen as a paramount constitutional responsibility of the Lord Chancellor. I saw my personal accountability for the operation of the judicial appointments system as an important principle. As public expectations developed, and the system came under criticism from some politicians, members of the public and sections of the legal profession, I took steps both to defend it and to develop it in ways which I saw as retaining its objective strengths and virtues.

During the period in question, both the range and volume of appointments were considerable and approaching contemporary proportions. The Lord Chancellor had personal responsibility for the appointment, or for advising the Queen—either directly or, in the case of the most senior judges, through the Prime Minister—on the appointment, of all members of the

professional judiciary in the courts in England and Wales (and Northern Ireland). The Lord Chancellor also appointed most of the magistracy in England and Wales. In the field of tribunals, he was responsible for appointments to those tribunals which the Department had always administered or come to administer (e.g. Lands Tribunal, Immigration Appeal Tribunal and Immigration Adjudicators), but also to tribunals administered elsewhere (e.g. Social Security Appeal Tribunals and Industrial—later re-named Employment—Tribunals). These were mainly, though not exclusively, legal appointments. (Other ministers still had responsibility for some tribunal appointments, e.g. Employment Tribunal lay members).

In relation to his judicial appointments functions, the Lord Chancellor was supported by the Permanent Secretary and the civil servants in the Judicial Appointments Group within the headquarters of the Lord Chancellor's Department. This eventually came to comprise six divisions, each one small by today's standards. One dealt with the appointment of Assistant Recorders, Recorders, Circuit Judges and more senior appointments; one dealt with the appointment of District Judges and Stipendiary Magistrates and Tribunal appointments; one dealt with the appointment of magistrates (and General Commissioners of Income Tax); one dealt with the training of magistrates; one provided the Secretariat for the Judicial Studies Board; and one dealt with policy and judicial pensions and conditions of service. Assistant Recorders, which ceased to exist during Lord Irvine's tenure as Lord Chancellor, were part-time judicial office-holders, in effect 'junior Recorders', who sat primarily in the Crown Court but could also be authorised to sit in the county courts. Stipendiary Magistrates have now been restyled District Judges (Magistrates' Courts).

The Courts and Legal Services Act 1990, which I promoted, revised the statutory provisions governing the minimum qualifications for each judicial office. This change was designed to broaden the qualifications for appointment, in particular by

making the generality of appointments potentially open to barristers and solicitors alike, so as to encourage the widest possible field of qualified candidates for selection.

The Lord Chancellor's policies and procedures for judicial appointments were set out in successive editions of the public booklet *Judicial Appointments*, first published in 1986. This booklet set out both the general principles of the system and the specific arrangements for appointments to the various judicial offices. These booklets were an important part of my wider concern to explain the judicial appointments system as fully as possible, not only for the direct benefit of members of the legal profession who might be interested in a judicial appointment, but also to broaden public understanding with a view to demystifying the process, something which was seen as an important principle in its own right.

The system prior to the mid-1990s

General principles

Three guiding and mutually reinforcing principles were articulated as essential to my policies. These were:

- a. that appointments should be strictly on merit;
- b. that candidates for full-time judicial appointments should normally be expected to serve in a related part-time capacity before being considered for full-time appointment; and
- c. that significant weight was properly attached to the independent views of the judiciary and members of the legal profession in considering candidates for judicial appointment.

Subject to the statutory qualifications for each office I considered it a cardinal principle to appoint (or recommend for appointment) to each post the candidate who appeared to me the best qualified to fill it. The relevant literature from the mid 1990s

made it clear that this principle was to prevail, without regard to gender, ethnic origin, marital status, sexual orientation, political inclination, religion or disability—at the same time emphasising the importance attached to equality of opportunity for all suitably qualified candidates, irrespective of personal background.

Given the security of tenure attached to full-time judicial appointments, it was also seen as important that a candidate should have served in a part-time capacity in a relevant jurisdiction for long enough to establish his or her competence and suitability for a full-time appointment. Such part-time service was seen to offer individuals an opportunity to consider whether they would wish to seek a full-time appointment, as well as affording an opportunity to the judiciary and leaders of the legal profession to assess an individual's potential for a full-time appointment.

Although the consultations with judges and others on candidates for appointment were stigmatised by critics of the system as 'secret soundings', I firmly believed that serving judges and members of the legal profession were particularly well placed to assist with their assessments of individual candidates. I saw consultation of this kind not only to incorporate a valuable element of peer appraisal in a demanding professional environment, but also to sustain necessary confidence and mutual respect between the bench and the practising profession. Obviously the statements made in these consultations were generally confidential. Concerted attempts were made to improve consultation procedures, to secure the widest possible range of comments on candidates, and to ensure that no one consultee's opinion, however striking (and whether favourable or adverse), was treated as decisive.

The views of the serving Lords of Appeal on the relative merits of potential candidates for future vacancies were regularly sought, as the basis for my discussions with the Law Lords and other senior judges, before I gave advice to the Prime Minister on filling a particular vacancy. And a similar process, also involving

serving members of the Court of Appeal, applied in relation to the appointment of new Lords Justices. As regards High Court judges, regular meetings were held by senior officials with serving Lords of Appeal, Lords Justices and High Court Judges, as well as the Chairman of the Bar, to seek views on potential candidates for future appointment; I would then personally consult the (then) four Heads of Division and Senior Presiding Judge, before recommending a candidate to the Queen to fill a particular vacancy.

A review of potential candidates for appointment to the Circuit Bench, and as Recorders and Assistant Recorders, was conducted annually by Judicial Appointments Group officials, following visits to each of the Circuits to collect assessments from Presiding Judges, other senior judges and local leaders of the profession on the suitability of serving Recorders for appointment as Circuit Judges; serving Assistant Recorders for appointment to Recordship; and candidates for appointment as Assistant Recorders.

There were generally varying, administratively-determined upper and lower age limits for appointments to the various part-time and full-time judicial offices. These limits were applied flexibly, but were designed to take account of the normal time-scales for progression from part-time to full-time office and to cater for a reasonable period of service following appointment to a full-time office, etc. I promoted the Judicial Pensions and Retirement Act 1993 which introduced a new general retirement age of 70 for all judicial offices, to replace the previous legislative mishmash, but with transitional provisions which preserved pre-existing higher retirement ages for those already serving.

Specific posts

New Lords of Appeal were appointed from among serving judges in the Court of Appeal in England and Wales or Northern Ireland, or the Court of Session in Scotland, following the consultation procedures outlined above. Lords Justices were

appointed from the ranks of serving High Court Judges, again in accordance with the procedures described above.

New High Court Judges were appointed by invitation to fill particular vacancies, either on promotion from the Circuit Bench or directly from the legal profession, and after a period of service in a part-time capacity as a deputy High Court Judge and/or Recorder. Those interested in appointment could make that known to the Lord Chancellor or his officials, but an invitation to serve was not dependent on an application. Recommendations were made to the Queen following the consultation procedures outlined above.

Prior to the major developments in the mid-1990s, it was the practice for Circuit Judge appointments to be made following applications by serving Recorders. Decisions were informed both by the consultation processes and by an interview conducted by the Head of Judicial Appointments Group and a senior serving or recently retired Circuit Judge, as well as specific consultation with the Presiding Judges of the Circuit in question.

Recorders were appointed during this period on promotion from Assistant Recorder after some years of service in that capacity and in the light of comments obtained in successive consultation rounds on each Circuit. Initially, all barristers of 10 years standing and solicitors who had applied for appointment were considered for an Assistant Recordership; later, barristers as well as solicitors were required to apply. Following the outcome of consultation with the judiciary and leaders of the legal profession, both nominated by the applicant and undertaken generally with consultees on each of the circuits and elsewhere within the judiciary and legal profession, those who were seen to be the most promising candidates were invited for an interview undertaken by an official from the Judicial Appointments Group and a senior Recorder. I made appointments in the light of the consultation and interview outcomes and following further specific consultation with the Presiding Judges on each Circuit. Those approved to sit as Assistant Recorders had first to complete an

induction programme including a training course run by the Judicial Studies Board and such introductory arrangements were applied progressively to other part-time judicial appointments. The selection process for Assistant Recordships was not time-limited and applicants could remain under consideration for several years, through successive consultation rounds, before final decisions were taken.

Appointments to the multiplicity of other full-time and part-time appointments—such as Stipendiary Magistrate, District Judge and Master of the Supreme Court, and their part-time counterparts, and the wide range of Tribunal offices—generally followed a system of application, appropriate consultations within the judiciary and legal profession and an interview with a Judicial Appointments Group official and a judicial office-holder from the relevant jurisdiction, as the basis for informing decisions by the Lord Chancellor. By the mid-1990s, all full-time Tribunal appointments made by or on the recommendation of the Lord Chancellor were made following applications and interview, and interviews were also held for most part-time vacancies. It was also the general practice to advertise many of these vacancies to the legal profession.

As has continued to be the case, I was supported by the network of local Advisory Committees on Justices of the Peace in appointing lay people as magistrates. Throughout the period in question, my role as Lord Chancellor also included the annual round of appointments of legal practitioners as Queen's Counsel.

Reforms in the mid-1990s

In July 1993, following a review of the judicial appointments system undertaken at my request by Michael Moriarty (a former senior Home Office official), I announced that I intended to introduce a progressive programme of developments in the existing judicial appointments procedures. I did so in a speech that month at the Judges Dinner in the City. I confirmed the aim to ensure that the best judges available were appointed, and

“to ensure that the methods of selection are as efficient, fair and as open as possible”. Announcing the changes, I expressed my continued confidence in appointments made under the existing procedures, which I said had served the public well and were too little appreciated by their critics. I made clear that I had no doubts about the quality of the appointments which the existing procedures had produced, but said that there was room for development.

The programme of developments was accordingly designed to build on the strengths of the existing arrangements and to make the appointments system as efficient, fair and open as possible, while maintaining the degree of confidentiality necessarily required. The programme of reform comprised:

- a. measures to improve arrangements for forecasting and planning the numbers and the expertise of the judges required at the various levels;
- b. the progressive introduction of specific (time-tabled) competitions for judicial vacancies;
- c. the preparation of more specific descriptions of the work of the judicial posts to be filled and of the qualities required;
- d. the progressive introduction of open advertisements for judicial vacancies below the level of the High Court bench;
- e. further measures to encourage applications from women and those of ethnic minority origin;
- f. a review of application forms and a more structured basis for consultations with the judiciary and the legal profession, linking with (c) above; and
- g. exploration of the scope for involving suitable lay people in the selection process.

In May 1994 I issued a public consultation paper on the implementation of these measures and proposed the progressive introduction of the new procedures commencing with appointments

to the offices of Circuit Judge and District Judge. Following a broadly favourable response to the consultation paper, I announced my intention to proceed with the introduction of open, advertised competitions, initially for appointment to the offices of Circuit Judge and District Judge, and advertisements duly appeared in the national and legal press over a period of approximately two weeks from the end of September 1994. The first vacancies to be filled under these new arrangements for advertised open competition were those for Circuit Judges on three circuits and those for District Judges on all circuits arising in 1995/96.

Similar open advertised competition procedures were progressively extended to other judicial appointments below High Court bench level. These new competitions had the following features:

- a. advertisements or announcements including advertisements in the national and specialist legal press as appropriate;
- b. job descriptions and statements of eligibility and selection criteria for each judicial office;
- c. an application form designed to elicit information to enable applicants to be assessed against the published selection criteria;
- d. consultations with judges and members of the legal profession; and
- e. an interview of selected candidates by a panel made up of a senior member of the Judicial Appointments Group, a serving judge and, for the first time, a lay person.

The advertisement/announcement of vacancies was designed to ensure that all those who were eligible and wished to be considered for appointment were encouraged to make known their interest, to ensure that all available candidates were considered and to provide the widest possible field for selection. It was also hoped that advertising would make the procedures for judicial appointments better understood by the public and profession.

The job descriptions were intended to give both applicants and a wider audience an informed appreciation of what each judicial office involved; and the formal selection criteria were seen as conducive to a process which enabled all applicants to be measured against the same requirements within a structured framework. In July 1994 I announced a regime of specific criteria for the appointment of Circuit and District Judges, as the framework within which the merits of individual candidates were to be considered. These criteria were:

- an appropriate level of legal knowledge and experience and professional achievement;
- intellectual and analytical ability;
- sound judgement;
- decisiveness;
- the ability to communicate effectively with all types of court user;
- the ability to command the respect of court users and maintain the authority of the court;
- integrity;
- fairness;
- an understanding of people and society;
- sound temperament;
- courtesy and humanity; and
- a commitment to public service and to the proper and efficient administration of justice.

These criteria, comprising a combination of professional skills and personal qualities, were contained with more detailed explanations of each of the requirements in the application material for the competitions for Circuit and District Judge appointments which followed and these criteria were also subsequently adopted for other judicial appointments. In seeking to define the qualities required of a 'good judge', in any jurisdiction, they were seen to provide an appropriate and objective basis for the

assessment of candidates through the various phases of the new competition processes—application, consultations, selection for interview and interview.

I saw the continuation of consultations with judges and the legal profession—with those nominated by the candidate and with a more general body of consultees—as an essential means of assessing the qualities of individual applicants. The innovative role of the lay interviewer was seen as bringing to the process something of the perspective of the lay court-user and of the wider public so as to broaden the basis of selection. The lay interviewers were initially selected from among the chairmen and members of the Lord Chancellor's Advisory Committees on Justices of the Peace, thus bringing to the role both expertise in interviewing and knowledge of the judicial system.

In making final decisions, the Lord Chancellor would have available to him the assessments of the interviewing panel and in addition the information in the candidate's application form, the outcome of the consultations with the judiciary and senior members of the legal profession and, where appropriate, comments made by the Presiding Judges of the relevant Circuit. But the Lord Chancellor would nevertheless continue to exercise full responsibility for each appointment.

The then House of Commons Home Affairs Select Committee carried out a review of the judicial appointments system between 1994 and 1996. In its report, published in July 1996, the Committee welcomed the programme for reform.

The arrangements for senior judicial appointments, at the level of High Court Judge and above, remained largely as before.

Equal opportunities

While committed to the principle that judicial appointments should be made wholly on merit, irrespective of the personal characteristics of individual candidates, I was also anxious to promote the principle of equality of opportunity for all suitably qualified aspirants to judicial office. I accordingly took steps to

encourage applications for judicial appointment from women and practitioners of ethnic minority origin, and to ensure that those who applied for judicial posts were considered fairly.

I introduced arrangements for gender and ethnic monitoring in relation to judicial appointments and took a number of other specific measures in support of my commitment to equal opportunity. These were conveniently summarised in a parliamentary answer in May 1994 and included:

- encouraging women and ethnic minority practitioners to apply for judicial appointments by promoting awareness of opportunities for them among senior members of the judiciary and the profession and inviting them to encourage suitably qualified persons from these groups to apply, and by publicising the judicial appointments system and opportunities in speeches, at 'outreach' meetings organised by officials, and by other means;
- applying age limits for judicial appointments flexibly in the case of practitioners who had taken a career break or who had started their professional career later than usual;
- providing opportunities for 'job shadowing' to enable familiarisation with the work involved in a judicial post for prospective applicants where appropriate;
- taking due account of the domestic circumstances of individuals wherever possible when making appointments to particular geographical locations; and
- arranging for an official in Judicial Appointments Group to act as a liaison point with others on equal opportunities issues in relation to judicial appointments and to advise on policies in this field.

Conclusion

The institutional structures for judicial appointments were transformed by the establishment of the Judicial Appointments Commission (JAC) under the provisions of the Constitutional

Reform Act 2005, which significantly reduced the role of the Lord Chancellor in the appointments process. And the Commission itself has since its inception in 2006 made important and valuable changes to the procedures for judicial appointments. In terms of the fundamentals, however—open, advertised competitions with candidates assessed against specified criteria—the reforms I introduced in the mid-1990s remain in place, supporting a process which continues to be of great public and constitutional significance.

During my time as Lord Chancellor I was free to exercise my judgement completely independent of any other person in the light of all the information available to me and it was never a consideration whether or not a candidate had made decisions or statements for or against the Government. At the Home Affairs Committee I was asked whether the Prime Minister had ever differed from the Lord Chancellor's advice on a judicial appointment. In view of the continuing confidential relationship, I gave a careful answer, but since that relationship is long since concluded I can now say that my advice was invariably taken by Mrs Thatcher and Mr Major as they then were.

In 1992 the serving Lord Chief Justice retired in the run-up to the general election. With the approval of the Prime Minister, as Lord Chancellor I consulted the Leader of the Opposition who approved the appointment of Lord Taylor of Gosforth. Again in 1996 following the sad and early retirement of Lord Taylor due to ill health, Mr Blair agreed the appointment of Lord Bingham of Cornhill.

This chapter was prepared with the assistance of David Staff and what follows, which relates to the period after Lord Mackay had retired from office, was written by David Staff.

Judicial Appointments 1997—2003

General

During this period, the new open competition procedures which had been introduced from the mid-1990s onwards were progressively extended to the full range of judicial appointments below the level of the High Court bench.

Changes

Lord Irvine, the new Lord Chancellor, made some changes shortly after taking office. For example, he modified the new competition procedures by arranging for a panel including a judge and a lay member (in addition to a departmental official) to determine the selection of candidates for interview, as well as actually conducting the interviews. He also arranged for candidates to be given an opportunity to respond to any imputation of professional misconduct in the assessments obtained about them in consultations with members of the judiciary and legal profession. The Lord Chancellor also increased the upper age limit for appointment as a magistrate to 65 with a view to achieving a better social and age-related balance.

There had been some expectation that the incoming Government of 1997 would move towards the establishment of a Judicial Appointments Commission as an advisory or executive body, i.e. to advise on or actually itself make individual judicial appointments. But in the Autumn of 1997, the Lord Chancellor announced that he was not proposing to proceed with public consultation on such a change, at least for the time being. He instead announced arrangements for the invitation by advertisement of applications for appointment to the High Court bench, to ensure that all who aspired to such an appointment could be duly considered (although the Lord Chancellor reserved the right to recommend the appointment of persons who had not applied). Applications were subsequently invited by public advertisement for all High Court bench vacancies arising

after 1 October 1998. The Lord Chancellor also announced his intention of publishing in future an annual report on the operation of the judicial appointments system. The first such report was published in 1999, covering the 1998/99 appointment year. This and subsequent reports covered general developments in the scope and nature of the judicial appointments system (and accordingly provide a commentary on the changes made during this period) and contained a repository of detailed statistical data on the outcome of each of the competitions held during the year in question, showing for instance how women and candidates of ethnic minority origin had fared. These reports were seen as an important means of providing information to the public on the general principles and detailed operation of the judicial appointments system and of reinforcing the Lord Chancellor's accountability for it.

As part of the continuing commitment to provide the fullest possible information about the judicial appointments system, new public information material was also produced, superseding the earlier *Judicial Appointments* booklets. And among other changes made during this period, the Lord Chancellor decided that serving District Judges could be considered for appointment to Circuit Judge posts exercising a civil jurisdiction even if they had not previously served as Assistant Recorders or Recorders.

The decision in 1999 of the Scottish Court of Session in the so-called *Starrs* case, ruling that the then arrangements for the tenure of temporary sheriffs in Scotland were not compliant with the requirements of Article 6 of the European Convention on Human Rights, prompted the Lord Chancellor to review the tenure arrangements for part-time (fee-paid) judicial offices in England and Wales. One outcome of this review was the Lord Chancellor's conclusion, announced in April 2000, that no useful purpose was served by retaining the separate offices of Recorder and Assistant Recorder. All those then serving as Assistant Recorders were promoted en bloc to Recordership and Recordership became the initial 'point of entry' into this part

of the judicial system, for the future by way of open, advertised competition procedures.

In 1999, the Lord Chancellor asked Sir Leonard Peach, the former Commissioner for Public Appointments, to scrutinise the judicial appointments process. Sir Leonard concluded in his report, produced in December, that the procedures and their execution were as good as any he had seen in the public sector but he made a number of recommendations for further developments to the procedures, including such matters as changes to the forms used in the judicial appointments process. He also—and more substantively—recommended the creation of a Commissioner for Judicial Appointments, as a kind of Ombudsman, and the piloting of the use of an assessment centre for candidates at which they would be required to undertake a range of exercises in addition to the interview (such a system being seen in the wider field of personnel recruitment and selection as a more accurate predictor of performance than an interview alone).

Following the ‘Peach Report’, the specified criteria for appointment were reviewed and modified and it was clearly stated that advocacy experience was not regarded as an essential requirement for appointment to judicial office. Application and consultation forms were amended as suggested and together with the revised criteria used in competitions from April 2000 onwards. The Commission for Judicial Appointments—not to be confused with the later Judicial Appointments Commission—was duly established, and the First Commissioner appointed, in March 2001. Its purpose was to conduct a continuing ‘audit’ of the procedures for judicial appointments and to investigate complaints about the application of the procedures in individual cases, involving alleged discrimination, unfairness or maladministration. The First Commissioner was Professor Sir Colin Campbell. Until its abolition in 2006 on the implementation of the Constitutional Reform Act 2005, this body provided an independent source of comment on the operation of the judicial appointments system, publishing both annual reports and

reports on its audits of particular appointment competitions. Work was undertaken on the proposal for the experimental use of an assessment centre and the Lord Chancellor decided that the first pilot should cover the competitions for Deputy District Judges, Deputy District Judges (Magistrates Courts) and Deputy Queen's Bench Masters advertised in April 2002. The assessment centre procedures were developed with the help of external consultants and serving members of the judiciary. The activities included a written exercise, a written technical paper, practical role-playing exercises based on simulations of courtroom situations and an interview. The subsequent evaluation of the pilot scheme indicated that it had been quite successful.

The Lord Chancellor also decided in April 2002 to remove most of the age limits which had previously been applied, albeit flexibly, in determining the field of eligibility for the various judicial appointments. Following a review undertaken by an inter-departmental working group, the Lord Chancellor announced in June 2003 that he was introducing broader opportunities for Civil Service lawyers in the CPS and the Government Legal Service to serve in part-time judicial offices.

Equal Opportunities

The Lord Chancellor attached significant importance to the principle of equal opportunities for judicial appointments, and he both sustained and developed the programme of measures designed to give it practical effect.

The Lord Chancellor and/or his officials organised and attended many 'outreach' events to provide practitioners with information about the operation of the judicial appointments system with the aim of 'demystifying' the appointments process and encouraging applications in particular from women and those of ethnic minority origin. The Lord Chancellor made a number of speeches at such events and coined the slogan "Don't be shy - apply". Among other initiatives, the magistracy was opened for the first time to blind and partially sighted candidates

(and later a blind Recorder was appointed). The Lord Chancellor introduced arrangements for flexibility in relation to part-time judicial sittings ('block sittings') so that those who had taken a career break could catch up more quickly on the number of part-time sittings required before they could be considered for full-time appointment.

The Lord Chancellor supported the appraisal and mentoring scheme for Deputy District Judges, initially established on a pilot basis on the Wales and Chester Circuit in 1997: this was extended to the North Eastern Circuit in 1999 and to the remaining Circuits in 2002. He saw this scheme as providing both an improved basis for the assessment of serving Deputy District Judges and an opportunity for serving judges to give constructive advice and guidance to less experienced colleagues.

The Lord Chancellor also commissioned academic research to help identify the reasons why those from groups currently under-represented on the bench might be disinclined to apply for appointment. A formal 'work shadowing' scheme was introduced in 1999 to give individuals an opportunity by sitting with a serving judge to acquire a more informed understanding of the nature of particular judicial offices before deciding whether or not to apply for appointment; the scheme proved very successful. A Joint Working Group on Equal Opportunities in Judicial Appointments and Silk brought together representatives of the Department and members of both branches of the legal profession and of associations representing women and lawyers of ethnic minority origin. Its remit was to consider and propose action to increase the number of applications for judicial appointments and silk from women and ethnic minority practitioners and to consider and propose possible changes to the appointment procedures. The Working Group's report with a number of recommendations was submitted in September 1999: most of the recommendations were accepted and implemented along with those from the 'Peach Report'.

The Lord Chancellor introduced the concept of 'salaried part-time' appointments, initially for new appointees in certain judicial posts where operational circumstances allowed. The scheme was later extended to the full range of judicial offices at and below Circuit Judge level and to serving as well as new judges. Subject to business needs, these arrangements gave individuals serving in what would otherwise have been full-time judicial posts an opportunity to sit on the basis of a reduced commitment, with scope for flexible sittings arrangements, so as to accommodate for instance the needs of those with responsibility for the care of children or others.

Although firmly opposed to any system of 'quotas' for women or ethnic minority practitioners, the Lord Chancellor arranged for research to be undertaken to enable estimates to be made of the proportions of women and lawyers of ethnic minority origin who might on the basis of the best information available come to be appointed over coming years. It was felt that such estimates could provide an objective and realistic benchmark against which future progress for these groups could be measured. Such projections, with necessary caveats about the limitations of the statistical material on which they were based, were subsequently included in the Judicial Appointments Annual Reports.

Judicial Appointments: Balancing Independence, Accountability and Legitimacy

The Constitutional Reform Act 2005

Jonathan Sumption OBE QC

Jonathan Sumption is a barrister and joint head of Brick Court Chambers. His practice covers all aspects of Commercial, EU and Competition, Public and Constitutional Law. He was appointed Queen's Counsel in 1986. He is a Judge of the Courts of Appeal of Jersey and Guernsey and a Deputy High Court Judge. He has been a Commissioner of the Judicial Appointments Commission since its creation in April 2006.

It has so often been said that Britain has no written constitution that we are in danger of believing it. Britain has an extremely elaborate constitution, almost all of which is written: in statutes, in recorded statements in Parliament, in the judgements of the courts, and in a handful of authoritative textbooks. What is lacking is not a written constitution, but two particular features which are characteristic of the written constitutions of almost every other country. One is that there is no single document in which our constitution is to be found. It is therefore difficult to study it as a coherent whole. Changes occur piecemeal as issues arise, not always with an eye to their implications in other areas. The other unusual feature is that our constitution is not entrenched. It can be amended by a simple majority of both Houses of Parliament or even, if the Parliament Act is invoked, in the House of Commons alone. There is no requirement for an enhanced majority, a referendum, or any other formal step which might provoke serious discussion of the implications. Indeed, those parts of our constitution which are based on practice can be amended without even the formality of Parliamentary sanction, by a mere change of political sentiment.

One consequence of this state of affairs is that constitutional change occurs constantly but imperceptibly in Britain, without necessarily being intended by any of the main interests involved. The great Victorian sages Bagehot and Dicey, thought that this was part of the efficiency of the British state. A less self-confident age is not so sure.

Given the long tradition of undeclared constitutional change in Britain, the most striking feature of the Constitutional Reform Act of 2005 is probably its title. Some of the changes, for example those relating to judicial appointments, could have been achieved without legislation, and in Scotland have been. But the resort to legislation at least meant that the process was deliberate and consultative, that its objectives were declared and considered, and that its results were intended, not accidental.

There are, however, some striking ironies about the policy as it emerged from this process. The declared objective of the Act was to move a little closer to the separation of powers than our previous arrangements had allowed. The doctrine of the separation of powers, in its purest form, requires the separation of the three branches of the state: executive, legislature and judiciary. It was first overtly formulated in England by John Locke at the end of the 17th century, and reflected recent constitutional struggles between Parliament and King James II. However, the most influential evangelist of the separation of powers was the 18th century French political philosopher Montesquieu, who was mainly responsible for the widespread but mistaken belief of his contemporaries that the English constitution was based on it. Eighteenth century England was not an absolute monarchy. In that rather limited sense, it came closer to Montesquieu's ideal than contemporary France, where the King enjoyed absolute executive and legislative powers and a high degree of control over the judiciary. But in fact English constitutional practice has always involved what by modern international standards is an unusually high degree of fusion between the three branches.

It is difficult to imagine that either Locke or Montesquieu would have been satisfied by the Constitutional Reform Act. They were mainly concerned about the dangers of fusion between the executive and the legislature. Since they wrote, executive influence over the legislature in England has progressively increased, to the point where the size of the ministerial vote coupled with the strength of party discipline in the House of Commons effectively ensures that the executive controls it between elections. But apart from the comparatively minor step of abolishing the position of the Lord Chancellor as Speaker of the House of Lords, the Constitutional Reform Act 2005 does not address this issue at all. Instead, it is almost entirely concerned with preserving the independence of the judiciary from the other two branches of the state. This emphasis on the independence of the judiciary, and the relative indifference to the independence of the legislature, is not just an English eccentricity. It reflects the international jurisprudence on human rights, and in particular the case-law of the European Court of Human Rights, which has always been much more concerned with the processes by which law is applied than with the processes by which it is made. At the international level at which the Strasbourg court operates, this makes perfect sense. Basic respect for the democratic process suggests that the content of the law is best left to national Parliaments. It makes rather less sense at a national level, where one would expect thoughtful democrats to be just as much concerned with the autonomy of an elected Parliament than with that of unelected judges.

In an English context, the exclusive concentration on judicial independence is particularly ironic, because while the executive's control over the legislature has increased by leaps and bounds, relations between executive and the judiciary have become progressively more formal and distant. By the time that the Constitutional Reform Act was passed, the judiciary had already achieved, by a mixture of convention, piecemeal legislation and case-law, a very high degree of independence from both the legislature and the executive. The court of final appeal

was the Appellate Committee of the House of Lords, which was nominally part of the legislature but in law and in practice a court. Its judges were parliamentary peers, but by convention abstained from taking part in politically controversial debates. The Lord Chancellor, a Cabinet minister, was nominally the head of the judiciary and the presiding judge of the Chancery Division, but his only surviving judicial function was to sit on ever rarer occasions on the Appellate Committee of the House of Lords. He appointed judges and was entitled to remove all but the most senior of them for cause. But both functions had for many years been exercised in consultation with the senior judiciary without regard to the interests of the executive or indeed to any political considerations. In those cases where the appointment was nominally the Prime Minister's, the Lord Chancellor made the relevant selection in exactly the same way. As with so many aspects of British constitution, the substance was more admirable than the form. The Constitutional Reform Act is largely concerned with the form. What it did was to put on a formal statutory basis principles which already governed the recruitment and status of the judiciary and to alter some of the institutional arrangements for giving effect to those principles.

The Act made changes in five areas, most of which reflected the random accretion of functions and prerogative powers to the office of the Lord Chancellor over the eight centuries of its existence. First, the Act overtly required the Lord Chancellor to protect the rule of law and observe the principle of judicial independence, both of which he was already required to do at common law and by statute as well in the broad areas covered by the Human Rights Act of 1998. Second, it abolished the Lord Chancellor's vestigial judicial functions. Third, it transferred the powers and functions of the Appellate Committee of the House of Lords to a new Supreme Court, which was both physically and constitutionally separate from the legislature, completing a reform that had been conceived and then abandoned in the 1870s. Fourth, while leaving the Lord Chancellor with the power to appoint judges, it created an independent Judicial

Appointments Commission and required him to appoint persons selected by it. Under the Act, the Commission produces a single name. The Lord Chancellor may reject it or ask the Commission to reconsider, but only on limited grounds which he must justify by giving reasons. Even then, if the Commission is asked to reconsider, it can come up with the same name. This system applies to substantially all judicial appointments including tribunal appointments, with the exception of appointments to the Supreme Court at one extreme and lay magistrates at the other. Supreme Court justices are required to be selected by a special commission on which the Chairman of the Judicial Appointments Commission (or their nominee) sits, but otherwise the Commission has nothing to do with it. The Act makes provision for the Commission to assume the function of selecting lay magistrates, but it has not done so. Finally, the Act sets up a formal statutory procedure, roughly corresponding to the one that had previously been applied informally, for disciplining and removing judges found to be unfit to retain their offices.

In two important respects, the Act requires the Judicial Appointments Commission to replicate the principles on which appointments were previously made by the Lord Chancellor. One relates to the criteria for appointment, and the other to the role of the existing judiciary in the process. Since both have proved controversial, it is perhaps right to say something about them.

Section 63(2), which applies to all selections by the JAC, provides that “selection must be solely on merit”. Apart from the overriding requirement that those selected should be of good character, that is the only permissible criterion for appointment. There was a good deal of discussion, both before the Bill was introduced and during its passage through Parliament, about what was meant by ‘merit’, and about its implications for judicial diversity. This is a complicated and difficult subject, which will be addressed in another chapter of this book. As far as the drafting of the Act was concerned, there were two schools of thought, sometimes referred to as the ‘minimalist’ and the ‘maximalist’

school. No short summary will do justice to the position of either camp, but put crudely the minimalist position was that the function of a selecting authority was to identify those who were good enough to do the job, and to choose from among those in accordance with wider criteria. These wider criteria would have included the desirability of a judiciary which is as far as possible as diverse as the population at large, or at least as the legal profession from which it is drawn. The maximalist position was that the selecting authority should choose candidates who are not just good enough, but the best available irrespective of race, gender, professional background, or any other consideration. Not every one can be a judge. But ambition and talent (actual or potential) are randomly distributed through the population. Provided that the educational system and the procedures for recruitment to the legal profession offer real equality of opportunity to talented individuals of whatever origin, both the maximalist and the minimalist approaches can be expected in the longer term to produce a judiciary which is as diverse as the pool from which it is drawn. Subject to these admittedly important provisos the difference between them is essentially a question of timing. The minimalist approach would probably accelerate a process which would otherwise take at least a generation to complete. But in the short term it could have implications for the quality of appointments, for the public reputation of those appointed and for the inclination of talented individuals of whatever background to apply, which would need to be carefully thought through.

These are intractable questions, but whatever the answer to them, there is no doubt that in the drafting of the Constitutional Reform Act the maximalists prevailed. 'Merit', as applied to the candidates for selection, can only refer to their relative ability to perform the functions that will be required of them if they are appointed. This embraces a wide range of personal and intellectual characteristics, as well as public expectations about how judges should behave. But it is concerned with the characteristics of individuals and not with the make-up of the

judiciary as a whole. The point is reinforced by the next section of the Act, which was added by amendment during its passage through the House of Lords. Section 64, which was very loosely modelled on the corresponding provisions of the legislation governing judicial appointments in Northern Ireland, requires the Commission to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'. Section 64 is expressly made subject to the criteria of merit and good character in Section 63. The scheme of the Act is accordingly tolerably clear. The Commission's duty is to do its best to encourage applications from the widest possible range of eligible candidates, including those from non-traditional backgrounds, but having done so it must select among them according to their aptitude for the job and nothing else. The record of debates and committee proceedings leaves no doubt that this was deliberate.

It is sometimes said that if the Lord Chancellor had more discretion, it would have been possible to achieve a more diverse judiciary faster than a statutory commission can do with a mandate to select candidates 'solely on merit'. There are, I think, two answers to this. One is that if the executive had more discretion, we could never be sure that it would only be exercised for admirable purposes. If the object is to provide transparency and some assurance that politics will not influence judicial appointments, then a wider measure of executive discretion can only serve to undermine it. The other answer is that if our society wants to achieve a faster move to diversity than is consistent with selection on merit alone from the existing pool, it can do so. But it is better that it should be done overtly by amending the statutory criteria for selection, than covertly by a minister without a public debate about the wider implications.

The second feature of the previous appointments system which is carried into the new one is the role of the existing judges. The main lines of the Constitutional Reform Bill had been set out in a statement made by the Secretary of State for Constitutional Affairs in the House of Lords on 26 January 2004. The terms

of this statement (sometimes called the 'Concordat') had been carefully negotiated with the judges. The Concordat provided for extensive consultation with the judiciary on appointments, more or less corresponding to the consultation which had been normal (but not obligatory) before. The Act requires the Judicial Appointments Commission as an integral part of the selection process to consult the Lord Chief Justice and either a previous holder of the judicial office in question or someone else with relevant experience. In practice, statutory consultees draw not only on their own experience, but on that of colleagues who may have better knowledge of particular candidates. The Act envisages that they may make 'recommendations' of their own. The Commission is not of course required to agree with the statutory consultees, and quite often it does not. But it is required when reporting its selection to the Lord Chancellor to tell him what if any recommendation the statutory consultees have made, and if the Commission has not followed it, why not.

Quite apart from the system of statutory consultation, the Act requires the Commission to appoint the Lord Chief Justice, Master of the Rolls, Heads of Division and judges of the Court of Appeal in a way which ensures that the existing judiciary will have the decisive voice. The Commission must appoint a statutory panel with a membership fixed by the Act, comprising two lay members of the Commission and two senior judges from outside the Commission. The panel reports directly to the Lord Chancellor, not to the full Commission. The effect is that the Commission, although nominally the selecting authority, is in reality only a source of seconded laymen for what is really a judicial body. Somewhat similar provisions apply to the quite separate commission charged with selecting Justices of the Supreme Court. This includes the two senior Justices of the Court. It is also required to consult all those who would have been consulted about appointments to the Appellate Committee of the House of Lords, namely the existing members of the Court together with the Lord Chief Justice, Master of the Rolls and Heads of Division.

One of the main criticisms which had been made of the old non-statutory system of appointments was that it was strongly influenced by 'secret soundings', the pejorative expression which was traditionally employed to describe consultation with existing judges. Any system of consultation about individuals is bound to be confidential if candidates are to be persuaded to apply and consultees are to express themselves freely. The position is exactly the same in relation to referees named by the candidates themselves. In that sense, the soundings can fairly be called 'secret'. But the significance of consultation has been much diminished since the range of appointments were opened up to applications in 1995. In the days when the Lord Chancellor tapped potential judges without warning on the shoulder, he depended almost entirely on prior consultation for his information about them. It followed that consultation had great, indeed decisive weight. Under an applications-based system, the range of information available about candidates is much wider, and largely in the hands of the candidates themselves. The relative weight of judicial consultation is bound to be smaller under the current system and its objectivity easier to assess.

It is indispensable nonetheless. Any assessment of an applicant by a body such as the Judicial Appointments Commission is inevitably a snapshot. It is sensitive to the candidate's performance on the day. This may have been affected by a variety of irrelevant or one-off factors, although both panellists and Commissioners are trained to give greater weight to track record than to the candidate's performance at interview or role plays. Information about track record is provided by the candidate themselves, their nominated referees and the referees nominated by the Commission to provide a more dispassionate assessment. However, it cannot be in the public interest to marginalise or ignore the views of those such as professional judges, who may have direct experience of a candidate's qualities or defects extending over many years.

The arguments against judicial consultation were fully ventilated during the passage of the Act, notably before the House of Lords Select Committee, and were found unconvincing for reasons which have been broadly borne out by subsequent experience. There are two main objections. They are, first, that it is said to encourage a tendency to appoint clones of the current generation of judges and, second, that it is said to give an undue advantage to candidates who are visible to existing judges, most of whom are barristers. The first objection assumes a narrowness of mind on the part of existing judges in a way which is rarely justified by the facts, at any rate in this writer's experience. Consultees are expected to give reasons for their views. Their influence is directly proportionate to the quality of those reasons, which is generally high. The second objection has greater force, but cannot be a good reason for excluding relevant information. Allowance can be and in practice always is made for the limitations of any consultee's knowledge of the field.

Given the degree of continuity between the old prerogative system and the new statutory one, one is bound to ask whether the Constitutional Reform Act deserves its grandiose title. There are more important things at stake than the naming of statutes. But the changes which the Act makes are plainly not on a par with those associated with other major constitutional enactments of recent times, such the European Communities Act of 1972 or the Scotland Act of 1998. Nonetheless, the Act was a necessary piece of legislation, at least in the area of judicial appointments with which this book is concerned. It was necessary for two main reasons, both of which have less to do with constitutional principle than with public perceptions and pragmatic precautions against abuse.

The first is that, although appointments had been free of political bias for many decades, without legislation there was no assurance that this would continue and a number of reasons to believe that it might not. The growing significance of judicial review since the 1970s and the enactment of the Human Rights

Act in 1998 are only the most significant of many developments which have combined to bring the courts and the Government into conflict. This has become, in the last two decades, a matter of major constitutional significance for the first time since the 17th century. In these circumstances, the temptation for the executive to avoid appointing or promoting judges perceived to have unwelcome attitudes is strong. We should not underestimate it simply because historically it has always been resisted. Under the pre-existing law, the Lord Chancellor made appointments in the exercise of the prerogative power of the Crown. He was not exercising any statutory power and was not bound by any statutory criteria, apart from the statutory minimum period of legal qualification. This did not make him immune from judicial review. But in practice, provided that he acted within the broad limits of rationality, he could do more or less as he liked. Even if he had gone badly wrong, the opacity of his processes would have made his appointments difficult to challenge. In most civil and common law countries, the executive has a role in the appointment of the more senior judges, but in very few is it as free of external constraints as it was in England before the Constitutional Reform Act. And it is fair to say that in those few countries, there have been well-informed voices to complain that lawyers unsympathetic to the government of the day have no realistic prospect of appointment to the more senior judicial offices. These complaints may or may not be justified. But in a system which is wholly in the hands of the executive, the impression is difficult to rebut in either case, and profoundly damaging to the standing of the judiciary as a whole. The Judicial Appointments Commission has no political axes to grind. It is not subject to direction by ministers and it has to select candidates in accordance with criteria which are public and identified by law.

There is another reason why the statutory transfer of selections to an independent commission was necessary, and indeed why it was probably necessary to do it in the way the Act did do it. The system of appointment by the executive in practice

produced a judiciary which was both independent-minded and of the highest calibre. But the maxim that 'if it ain't broke, don't fix it', has its limits. The old system of appointments had been under attack for many years. Its defects were more apparent to the public than its pragmatic merits. It no longer commanded public support. If this state of affairs had continued, it would ultimately have undermined public confidence in the judiciary, for all its qualities.

In its treatment of judicial appointments, the Constitutional Reform Act can be fairly described as cautious. It is certainly not radical. But there are good reasons to expect constitutional legislation to be durable and, as far as possible, non-partisan. It inevitably involves compromises that will prove disappointing to articulate idealists. The quality of any judicial system depends on the willingness of outstanding individuals to accept appointment, something which is stronger in this country than in any comparable jurisdiction, but can easily be taken for granted by those who see only the externals. The reality is that judicial appointments are made in a fragile environment. Not every one who is suitable for appointment wants to be a judge, and many of those who do apply will have found it a difficult decision. Some aspects of judicial life are intensely rewarding, others profoundly frustrating. The more talented the individual, the wider and more attractive his alternatives. The quality of recruits and their performance after appointment have always been exceptionally sensitive to intangible factors whose impact is not immediately obvious and which are not easily regulated by law. The collective reputation of the judiciary, public duty and professional expectations, an instinct for the underlying values of any society as complex as Britain's are all part of it, along with the unspoken, unlegislated corpus of shared standards which characterise any institution with a long history. These things, which are in large measure responsible for the quality of the existing judiciary, are impossible to create by command, but tragically easy to destroy by mistake.

Translating Aspirations into Reality: Establishing the Judicial Appointments Commission

Baroness Prashar CBE

Prior to becoming Chairman of the Judicial Appointments Commission in 2005, Baroness Prashar was the First Civil Service Commissioner (2000 to 2005) and Executive Chairman of the Parole Board for England and Wales (1997 to 2000). Formerly she was Director of the National Council for Voluntary Organisations, Director of the Runnymede Trust, and served as a member of the Royal Commission on Criminal Justice and the Lord Chancellor's Advisory Committee on Legal Education and Conduct. Since 1999 she has sat in the House of Lords as a cross-bencher and is currently a member of the Iraq Inquiry.

In his 1999 Atkin Lecture, Michael Beloff QC said:
“I would prefer some form of appointments commission, whose membership and whose functions should be legislatively defined so as to ensure that merit alone was the touchstone of elevation to the bench. I appreciate that it will be asked... “Who will appoint the appointers?”... there is no perfect solution. What is important is that my proposal increases not narrows the distance between the politicians and the judiciary. Accountability—the favoured buzz word of those who take the other view—is in my view, a euphemism for control. From my perspective the virtues of an appointments commission is not that it exposes judges to, but that it protects them from, the excesses of democratic or popular selection.”¹

1 Beloff, Michael J., ‘Neither Cloistered Nor Virtuous? Judges and

Such a judicial appointments commission was eventually set up in April 2006, following the Constitutional Reform Act 2005 (CRA). The creation of the Judicial Appointments Commission (JAC) was an unprecedented move to make the process for selection of judicial office holders independent of the executive and the judiciary. It also introduced a lay element in order to bring broader perspectives to the process. It was designed to enhance judicial independence and increase the judiciary's legitimacy by making it more reflective of contemporary society.

While changes to selecting judges for appointment were the least contentious part of the CRA there were, nevertheless, apprehensions among some members of the judiciary, the executive and the legal profession. Some had misgivings about loss of patronage and influence, others had concerns about changes to established practices which were likely to result in a very different system of judicial appointment. They considered that the old system had worked perfectly well. There were fears that moves to widen the pool from which the judiciary was drawn might lower standards. There was a view that merit and diversity were incompatible and that the new body might approach the task in a 'politically correct' manner. Among others, expectations were high of the ability of the new Commission to create a diverse judiciary overnight. Others feared that an open and accountable process for appointment, the need to apply, and the possibility of failure might deter some good candidates. Some were sceptical about whether the new Commission would be truly independent of the executive and the judiciary.

Furthermore, while the new statutory regime introduced clarity through more open and clearly delineated rules, it also brought rigidity through its prescriptive and inflexible nature. These statutory arrangements with prescribed individual and organisational roles created overlaps and tensions between the various partners. As a new body, the JAC had to find its place and

their Independence in the New Millennium', *Denning Law Journal* (Buckingham: University of Buckingham Press, 2000).

establish itself in between pre-existing relationships. Against this background, changes and attitudes which the new Commission was expected to tackle were substantial. Apart from developing fair and non-discriminatory selection processes which commanded the confidence of all the constituencies and ensuring that applications were drawn from a much wider and diverse pool than had been the case hitherto, there was an urgent need to change some deep-seated attitudes and practices; overcome resistance to change; build effective working relationships with the judiciary, the courts and tribunals services and the then Department for Constitutional Affairs (DCA, now Ministry of Justice (MoJ)) while respecting the distinctive role of each; build an effective organisation which could cope with the scale and complexity of its statutory responsibilities; and manage unrealistic expectations about the speed with which the JAC could diversify the judiciary.

The CRA is an interesting mixture of high principles and low level bureaucracy. For example, it precludes the JAC from launching a selection exercise until it has received a formal request to do so from the MoJ, following identification of judicial requirements. This is done by the MoJ in consultation with the judiciary. Problems in both the timing and accuracy of these vacancy requests, due to a lack of appropriate forecasting and planning, caused delays.

Then there were differences of view about the suitability, completeness or adequacy of the information received in the context of each party's interpretation of their distinct role in the process. One issue which caused tension was the use of non-statutory eligibility criteria. The JAC challenged those criteria it believed would narrow the pool from which candidates could be drawn and which could not be justified on grounds of need. This caused tension because out of all the partners, the JAC alone has a statutory remit to widen the pool. Its challenges to some criteria in vacancy requests were seen as obstructive.

Impatience was rife and commentators, particularly those not totally convinced about the changes introduced by the CRA, were quick to criticise the JAC without understanding fully the reasons for challenges or the causes of delay.

The JAC is a selecting rather than an appointing body. Once it has made the selection the name is sent to the Lord Chancellor for approval and, if accepted, the successful candidate must then be appointed formally and appropriate training organised. Successful candidates may then need to relinquish their current professional commitments before they can take up their appointments. The JAC was dependent upon the judiciary and the MoJ for ironing out difficulties with forecasting future vacancies and progressing the final stages of appointments. As a new body on the scene, problems were seen as a consequence of its new ways of working.

Creating an organisation capable of achieving the objectives of the Commission, and working within the requirements of the Department as a non-departmental public body, was made even more difficult by the fact that much of the Commission's work during its first year of existence was overshadowed by uncertainty and coping with transitional issues. It was not an auspicious start.

Before the launch of the JAC there was no shadow working. This meant that there was no scope for designing new processes or setting up managerial and governance arrangements ahead of launch. Transitional arrangements were ill thought out and haphazard. The JAC inherited selection exercises that were already underway or about to start and initially followed selection processes used previously by the DCA. While establishing itself and developing new processes, the JAC managed four categories of selection exercise. This situation had to be managed but caused confusion for the wider world and for the applicants.

Most of the staff were seconded from the DCA. Overall, there was to be a planned 100 per cent turnover of staff, with secondments lasting one year, 18 months and 24 months. This was a

well-intentioned plan intended to mesh with future relocation, but reliance on secondments meant that there was a perception that the JAC was not totally independent but an adjunct of the Department.

The possibility of relocation led to further uncertainty. Before its launch, a decision had been taken to relocate the JAC outside London by March 2008. After some time-consuming negotiations, the JAC persuaded the DCA to rescind this decision, enabling it to begin work with some sense of stability and to plan for the recruitment of its own staff.

For the Commissioners it was vital to ensure that the document which set out the strategic relationship between the Department and the JAC contained a clear delineation between the JAC's own responsibilities and powers and those of the Lord Chancellor, thus protecting the Commission's independence. The document² was eventually agreed in October 2006.

This inauspicious start was confirmed by a five per cent cut in the JAC's budget in the first year of its existence.

The JAC Commissioners, all of whom—with the exception of three judicial Commissioners selected by the Judges' Council—were recruited through open competition, were fully aware of these challenges and were committed to the objectives of the JAC and its remit. The process for the selection of Commissioners and who selects the selectors is fundamental in order to ensure that they are appointed on merit with no political interference. An appointments commission which is, and is perceived to be, independent is vital to ensuring an independent judiciary. And at the heart of an independent JAC are its Commissioners. The process for their selection, therefore, has to be independent and robust.

It is worth dwelling on how the Commissioners are selected. By statute the JAC is required to have 15 Commissioners, drawn from the courts and tribunals judiciary, the legal profession, the

2 <http://www.judicialappointments.gov.uk/about-jac/about-jac.htm>.

lay magistracy and lay public, including a lay chairman. Each is appointed in their own right and is not a representative. The Commission's composition ensures a breadth of knowledge, expertise and independence of thought is brought to the formulation and implementation of policy and practice. Its make-up is finely balanced to secure judicial input and lay perspectives.

Schedule 12 to the CRA makes some provision for the appointment of JAC Commissioners, requiring that they may not be appointed for more than five years at a time and not for more than 10 years in all. There is, however, a lack of specific detail, and the MoJ's position is that Office of the Commissioner for Public Appointments (OCPA) guidance will apply where the CRA does not provide specific arrangements. OCPA guidance provides ministers with considerable flexibility in making selections for public appointments and, importantly, choice in candidates recommended for selection. When making initial selections of Commissioners in 2005-2006, it was agreed with the then Lord Chancellor that the independent selection panel, led by the former Chairman of the Committee on Standards in Public Life, Sir Nigel Wicks, would not follow this aspect of the guidance, and would instead provide one name only for each Commissioner appointment, consistent with the provisions in the CRA for the appointment of judges that were carefully crafted to ensure judicial independence. Such a process ensured, both in perception and in reality, that the Commissioners were independent.

From the outset, the Commissioners were very conscious that judicial office holders deal with matters affecting the freedom of individuals and that judicial independence is a key principle of our constitution and a safeguard to the liberty, rights and protection of our citizens. It was, therefore, important to create a system of judicial appointments that protected judicial independence and excellence and provided greater accountability, promoted democratic values and enhanced the legitimacy of the judiciary. A modern, democratic society demands that its

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judges are not only chosen in a fair and open way, but are seen by the public to have been chosen in the fairest possible way, taking nothing into account other than the ability to do the job. Perception, confidence and trust are vitally important, and diversity is a key factor. The Commissioners were fully aware of the debate and the activity taking place in the name of diversity, its benefits, why it is important and how to achieve it. They did not see merit and diversity as incompatible. The benefit of widening the range of applicants for them had a powerful simplicity. If more people from a wider range apply to be judges, the merit of those who are selected can be enhanced. If there are a variety of intellects and views drawn from a wider field of experience then decision-making, argument and ultimately justice will be better served. Our task was how to integrate diversity fully into the organisation and all its operations, and conduct the selection of judges to the highest standard.

Mindful of the fact that the precedents set by the inaugural Commission would determine the future operation of the JAC, independence became the Commission's guiding principle and professionalism its hallmark.

Initially there were four critical tasks. One, to induct the Commissioners into their new role, to ensure that they worked as a cohesive group and that their individual and collective strengths were harnessed. The main challenge was to ensure parity among Commissioners so that there was no distinction between lay and judicial members. This was vital to enable frank and open discussions and respect for different perspectives, in order to arrive at high quality decisions both on policy and selections. It established a style of decision-making important for the type of changes and challenges the Commission faced and enabled the Commissioners to work collectively and cohesively. This ethos was underpinned by effective governance arrangements, such as clear policies on declarations and conflicts of interest, and methods of working to ensure effective and efficient use of their expertise, time and the resources at the disposal of the JAC.

The second task was to determine what makes a good judge, that is, to define 'merit'. After extensive consultation and discussion, the Commission developed a simple, streamlined definition that would be easy to understand, not burdensome for candidates, enable effective assessments and help referees to provide pertinent observations. The Commission also developed its policy on 'good character', in line with its duty to select only those who met this requirement, and this, for the first time, was made publicly available.

A third priority was to develop effective, fair, non-discriminatory, rigorous and proportionate selection processes to enable the effective application of the merit criteria, in order to achieve high quality outcomes. While merit must include objectively determined and consistently applied criteria, what matters more is how these criteria are applied and the authenticity of the reasons for selecting candidates. Appointment on merit is, therefore, as much about open and fair process, as the elements of merit itself. Robust quality assurance measures and equality checks were integral to the new selection process, which includes an application form, qualifying tests, role-plays, references and interview. Some elements of the process have not been without controversy.

The fourth task was to build effective working relationships with all the key interested parties, that is, the judiciary, the legal professional bodies (such as the Bar Council, the Law Society and later the Institute of Legal Executives), the MoJ and organisations such as the Black Solicitors Network, the Association of Women Barristers and the Group for Solicitors with Disabilities. Building confidence in the new processes, dispelling misconceptions and managing expectations was key. The purpose was to raise awareness about the new method of selecting judges, destroy some of the myths and enhance the open and accountable nature of the new system.

Four years on, some of the early concerns that the new system would deter the best and the brightest from applying, and that merit and diversity are incompatible, have largely fizzled

away. The Commission has succeeded in developing rigorous selection processes which have delivered high quality recommendations, which have been commended. The process for appointing senior judges has become far more open. All of this has helped to enhance the legitimacy of the appointments in the eyes of the public.

Foundations have been laid for much more sustainable change and collaborative working between all concerned to make progress on diversity. More importantly, there is now better understanding of where the real barriers to progress are and whose responsibility it is to tackle them. It is now more widely recognised that these barriers arise from complex social and educational problems. There are limits to what any system of judicial appointments can achieve until they are addressed.

The arrival of the new Commission has acted like a litmus paper, revealing the extent to which progress on judicial diversity is restricted by systemic barriers which are outside the JAC's control. A number of diversity initiatives had previously been in place across the justice system, but there was a sense that everyone was working in isolation. The establishment of a Diversity Forum by the JAC in 2008 to bring together the legal profession, the judiciary, the MoJ and other interested parties to highlight their interdependency and encourage collective working to speed up change has enabled greater interaction and dialogue and deepened understanding of the issues, with better co-ordination of respective initiatives. Importantly, it has allocated ownership of the problem to those capable of making a difference. This is a real cultural shift.

Encouragingly, progress has occurred. For example, the number of women in the High Court has increased by almost 50 per cent since the JAC was established and joint analysis with the MoJ of the diversity of appointments over the last ten years³ suggests an upward trend in the proportion of women applying and being successful for most posts since 2006. Former solicitors

3 <http://www.judicialappointments.gov.uk/about-jac/165.htm>.

now sit as judges in both the High Court and, for the first time, the Supreme Court.

The selection process has become more timely and cost effective under the JAC. For example, there has been a 20 per cent reduction in the average time taken to complete a selection exercise, compared to the DCA (19 weeks compared to 24 weeks). The JAC cost of handling an application for appointment is 20 per cent less than the DCA, and we have reduced our spending and made year on year efficiencies. We have done this while maintaining the quality of our core activity.

As stated earlier, the CRA is an interesting mixture of high principles and low level bureaucracy. While early operational and bureaucratic difficulties have been resolved, there are some lingering issues about the interface between the JAC, the courts and tribunals services and the MoJ. From the outset it was inevitable that the application of the CRA by the newly created JAC would lead to a clash with the pre-existing power bases, as the new body sought to establish itself within the judicial appointments landscape. While some of the remaining tensions are inherent in the legislation, others are about different approaches and perspectives. These can be resolved with positive collaboration, an appreciation of the independence of each part, and the ability to make the system as a whole work without resorting to 'blame culture'. It would be a pity if operational issues, which can be resolved, were used to undermine the significant constitutional achievement of an independent appointments commission.

Against the background of the current economic difficulties, some are asking what value the JAC has added over the last four years. The JAC has not only reduced the cost of the process, but brought other, intangible but very important benefits such as enhanced openness, independence and legitimacy of the appointments in the eyes of the public. It has reinforced the independence of the judiciary and has upheld excellence while widening the field from which judges are drawn. It has laid strong foundations on which further success can be built. Four

years is not a long time in the life of a new organisation and there are no magic bullets to speed up change on diversity or change deep seated attitudes which have been ingrained for years.

How judges are selected is a matter of constitutional significance. Selection is not just about sterile processes. It is about balancing independence, accountability and legitimacy, and ensuring that the process for selection is not captured by any vested interest. Tension between independence, accountability and legitimacy is inevitable, as our experience and that of other countries shows. For example, some are suggesting that the culture of accountability and the consequent focus on open criteria for selection fairly applied may have circumscribed the discretion of ministers too far, and proposing to change the system to one whereby a list is provided by the selecting body from which the minister can choose. Others are questioning the balance between judicial and lay involvement in the selection process.

Over the last four years the JAC has endeavoured to manage tensions and fulfil its remit as envisaged by the CRA. In so doing it has not won many friends. On occasions it has felt like turning a juggernaut on difficult and unfriendly terrain! But then its job was not to please any one particular constituency, rather to translate the aspirations of the legislation into reality by implementing the necessary changes. Change to established practice and giving up patronage is never easy. The CRA was a brave, even in some quarters unpalatable, attempt to enhance judicial independence and increase the judiciary's legitimacy. It has aroused a great deal of interest in other common law countries. It would be short-sighted if financial imperatives, bureaucratic convenience, misconceived perceptions and vested interests come together to undermine what has been achieved within such a short space of time and at relatively little cost.

Judicial Appointments: Balancing Independence, Accountability and Legitimacy

What Makes a Good Judge?

Mr Justice Hickinbottom

Sir Gary Hickinbottom was admitted as a solicitor in 1981, and became a partner in McKenna & Co (now part of CMS Cameron McKenna). He was appointed a Recorder in 1994, a Circuit Judge in 2000, Chief Social Security & Child Support Commissioner in 2003, and the Designated Civil Judge for Wales in 2005. In 2008, he was appointed the first President of the Administrative Appeals Chamber of the Upper Tribunal, and made Deputy Senior President of Tribunals. In 2009, he became only the fourth solicitor to be appointed to the High Court bench. He is assigned to the Queen's Bench Division.

What do judges do?

Until recently, a judge's job, if not simple, was at least narrow in scope. Judges sat in court, where trials would be listed before them. In a civil trial, they would hear the oral evidence and submissions, decide what happened, identify the relevant rules of law, and apply the law to the facts as they found them. In a criminal trial, their role was similar; although, of course, a jury would decide the facts and apply the law as given to them by the judge—and the judge would sentence any convicts. They would rarely work when not sitting—they would sit from 10.30am until 4pm, and very often rise earlier. They would have a proper lunch. When there were no cases listed, they would have nothing to do. Many judges would keep a fishing rod in the boot.

Over the last 20 years or so, the work of judges has immeasurably changed.

First, their work they do in court has changed. Parties are no longer allowed to conduct proceedings without some form of case management, which requires judges to be actively involved in managing cases from issue to trial. Much case management is done on paper. Even when there is a hearing, it is often by way of telephone conference call. For many judges, the amount of case management work far exceeds the time they spend on final trials.

Thankfully, judges do still sit in court—but, even in trials, evidence and submissions are now largely committed to paper, which means that a judge's work may be predominantly reading, rather than listening. Judgments in longer or more complex cases are given, after a period of reflection and deliberation, in written form. A substantial amount of judicial work does not involve 'hearings', in the traditional sense, at all. Many decisions are given in writing, the judge having considered a paper application and written submissions; even if a dissatisfied party might have the right to have that decision reconsidered at an oral hearing. As a result of all of that, many judges spend more time working in their rooms than actually in court.

Second, in addition to the management of cases, judges have been increasingly involved in the administration of the justice system. The Constitutional Reform Act 2005 not only made the Lord Chief Justice responsible for judges in the courts, it also imposed upon him a variety of obligations—including judicial discipline, training and welfare—much of which has been delegated down to other judges, often at local level. The Tribunals, Courts and Enforcement Act 2007 imposed similar responsibilities upon the Senior President of Tribunals in respect of tribunal judges, many of which have again been delegated down to other judges in that system. Judges have in any event become increasingly involved in the administration of their part of the justice system, for example in the assignment and listing of cases. Most full-time judges have some administrative responsibilities, in one form or another.

Third, the scope of judicial work has expanded, partly because judges now have a more important—or, at least, a more overt—role within the constitution. At the level of the High Court and above, since the 1960s we have seen the rise of judicial review work, in which members of the public challenge decisions made by various arms of government in the widest sense; and, since the Human Rights Act 1998, all judges have been required to ensure that their decisions are compliant with the European Convention on Human Rights. To a greater or lesser extent, all judges now have to consider whether a wide range of government decisions are lawful in the light of general public and human rights law.

Finally, the size and breadth of the judicial family has expanded. In 1970, there were fewer than 300 judges. By 1998, this number had risen to 3,000. There are now over 9,000. That increase reflects not only the extended role of judges and the amount of work that they do, but also the increase in number of fee-paid, part-time judges—and, importantly, a proper recognition that others within the justice system who sit in judgment (such as those who were formerly District Registrars, and those who sit in tribunals) are as much ‘judges’ as those who work within the higher echelons of the court system.

How the public regard the work of judges is also important. Although judges now have a broad scope of work, their ‘core business’—in truth, and certainly in the eyes of the public—remains deciding cases. Judges are still required to determine claims between citizens and, more often, between a citizen and the state. The weight of that responsibility should give any judge pause for thought. In almost all cases, before whatever tribunal, the case is regarded as being of vital importance by at least one party. Some cases have wider importance—for example, for victims or for a particular section of the public. Judges are not

important in themselves; but what they do is important, and what they do is still regarded by the public as being important. By the nature of judicial work, it is vital that public confidence is maintained in the justice system, without which the rule of law—crucial in any democratic society—would be undermined.

The Attributes of a Good Judge

As a result of those substantial and indeed revolutionary changes in judicial work, the attributes of a paradigm judge have also changed. What makes a good judge today?

Although any categorisation or compartmentalisation is necessarily artificial, the attributes of a good judge can perhaps be looked at from three perspectives: professional, personal and administrative.

Professional attributes

Because of the nature of their core work, judges do still need to have a knowledge of the law. Every judge swears a judicial oath to do justice “after the laws and usages of this realm”, i.e. by applying the law. To apply it, he¹ must have some knowledge and understanding of it.

While it is true that most judicial work is focused on fact-finding and, at least below the stratosphere of the highest courts, it is not necessary to have any comprehensive understanding of jurisprudence, there is a need for a judge to have a working knowledge of the law in any jurisdiction in which he sits; or at least an ability to discover and pick up that law, and quickly. While judges sometimes have the advantage of legal representatives to assist them, increasingly, with reductions in public funding, one or both parties in a case do not have the assistance of a lawyer. A judge has to ensure that no one is disadvantaged by

1 We have too few women judges. I hope that it is clear from this chapter why, in my view, it is important that we should have more. However, in this chapter, purely for grammatical convenience, I have taken advantage of the Interpretation Act 1978 s6.

a lack of adequate representation. For that, some knowledge of the relevant law—or an ability to acquire it, if necessary during the course of a case—is essential.

In any event, a judge must have the ability legally to analyse a case before him. A judge needs to be able to identify the determinative issues in the case—the factual or legal questions that, if answered, will decide the case—so that scarce judicial resources are used effectively in deciding those issues. While the identification of determinative issues is also an advocate's job, legal representatives are often under pressure from their ultimate clients to pursue all sorts of other matters, which parties may wrongly consider of legal importance; and the judge is in the best position to undertake that task. It is an important part of his job. Normally, even in quite complex cases, the number of determinative issues is relatively small.

A further attribute, which again spans the professional and personal, is good judgment—and an ability and willingness to come to decisions, often quickly and decisively. Judges frequently make decisions that are 'routine' for them—they are decisions of a type they make everyday—but they may be of vital importance to those involved because, for example, they will result in someone losing contact with their own children, losing possession of their home, being required to leave the country, or being sent to prison. Many of those judicial decisions are made under pressure. Although there is usually a right of appeal, given their consequences, a judge must usually make a broadly correct decision so that confidence in the system is maintained; and he must also, having deliberated and made that decision, not unduly dwell upon it. Not everyone can do that. It is vital that a judge is able to do so.

Further, given the frequency with which such decisions are made, particularly by full-time judges, it is important that familiarity with such cases does not breed contempt, in the form of unpreparedness or a loss of sensitivity. This requires intellectual concentration, as well as rigour, on a judge's part—a constant

recollection that every case, no matter how routine for a judge, is of importance (and often a unique experience of the justice system) for a party, a witness and someone else engaged in it.

Personal attributes

However, being ‘a good lawyer’ is not enough. A good judge also needs certain personal qualities.

The work demands integrity—not just intellectual integrity, but also impartiality and objectivity. Given that we all have prejudices born of our background and experience, a judge needs awareness of his own prejudices, so that he can avoid decisions being influenced by them. Prejudices are irrational, and irrelevant to judicial decision making. We all tend to think that we are by nature not prejudiced—but inevitably we tend to understand more readily those before us who come from a similar background or from a background with which we are familiar. To be objective takes a persistent concentrated effort to be open-minded.

That does not mean to say that our background and previous experiences are entirely irrelevant to judging. Lord Kenyon, who was Master of the Rolls and Chief Justice of the King’s Bench at the end of the 18th century, is said to have been “unacquainted with every portion of human knowledge except the corner of jurisprudence which he professionally cultivated”. Such narrowness does not make for a good judge.

In some jurisdictions, some general knowledge is essential. By way of example, an immigration judge, of course, has to be aware of conditions in countries throughout the world from where asylum claimants come; and a Crown Court or county court judge or tribunal judge often needs to know and understand local matters.

But, in any event, to command the confidence of the public, a judge needs to have a working knowledge of everyday life. It does not instil confidence for a judge to ask who the Beatles were, or what a crossword is, or, more substantively, to be unaware of the

conditions in which those who are regularly before the court live and work. While Oliver Wendell Holmes (perhaps the most distinguished US Supreme Court Judge, who sat in that court for 30 years until 1932) never read a newspaper, and Sir Edward Coke (Chief Justice in the early 17th century and “the father of the common law”) never saw a play, “nowadays the ability of men and women to serve adequately as judges is likely to bear a closer relation to their knowledge and experience of life outside the courtroom.”² It is sometimes said by the ill-informed that judges do not inhabit or understand the real world. In my experience, dealing with practical aspects of the everyday life of a variety of people all the time, they have a greater knowledge and understanding of ‘the real world’ that people live in than do most. Certainly, it is important that they should do so.

A good judge also requires a good temperament. The work demands calmness. When they attend court, parties and witnesses are often anxious, and frequently upset. A judge should never forget that any case for a party is likely to be important and cause anxiety, and often disappointing in the result for someone—as for every successful party, there is an unsuccessful party. A judge sometimes needs to have strong character and resolve to prevent his court being disrupted, but also needs to be sensitive to the emotional state of those involved in the case before him.

Further, cases may be badly prepared or otherwise frustrating. Advocates may be inexperienced, or simply poor. A judge needs to have a temperament such that he is never seen to lose his temper, even in the face of ineptitude or ignorance of those

2 David Pannick, *Judges* (1987) (Oxford University Press), p 38. One of the advantages of being a judge is that, sometimes, others (usually advocates) do the research for you. David (now Lord) Pannick’s book contains many examples of good and bad judicial behaviour, some of which I have gratefully used and am very pleased to acknowledge. His book (as well as, of course, Lord Bingham’s essays now published as *The Business of Judging* (2000) (Oxford University Press)) warrants full reading by anyone who is, or who aspires to be, a judge.

before him. If displeased for good cause, a judge has plenty of proper sanctions that he can apply without being petulant. In my first week as a county court judge, a party to a lengthy trial attended on its first day, wholly unprepared to start and without any good excuse. The trial had to be adjourned. The clerk was concerned I had not “shouted at them” as “Judge X would have done”. I did not shout. I did, however, order the solicitors in that case to pay the costs wasted by the adjournment, which I considered to be a more constructive and appropriate thing to do. The case was fully prepared at the adjourned hearing.

A judge must always be courteous and patient, but there are proper limits to patience. A judge is always responsible for his court, and must be able to remain in control of proceedings in it. Judicial resources are scarce and precious, and judges need to ensure that time is used appropriately and proportionately. A judge needs to understand the pressures properly upon a party and his legal advisers—and needs to understand the process of the case before him—so that he can, at the appropriate time, say “no” or “no more”. That is part of the ability to case manage and run a court.

Further, justice has not only to be done, but seen to be done. Virtually all judicial work involves members of the public, and most is done in public. Again, that requires a judge to have certain attributes, both positive and negative.

Positively, a judge must be able to express himself, and make himself understood. Parties have a right to know who has won and who has lost, and why. And so a judge must be able to make the reasons for his decision understood by the parties, whether multinational companies represented by leading advocates or litigants in person. A good judge needs the ability to talk to and be understood by all sorts of people, from time to time—not only the parties themselves, but also their lawyers, the newspapers, the academic press, and of course the Court of Appeal if they are asked to consider the decision again. That also requires sensitivity. It is often said that a judgment should be aimed at the unsuccessful party—because it may not matter to a successful

party why he has won. But, in what a judge says and how he runs a case, a judge needs constantly to be sensitive to all other interested people, for example victims and their families, and others who may be affected by a judicial decision. That is all part of the need for a judge always to be sensitive to all around him, when conducting a case.

Negatively, a judge must be able to refrain from doing or saying silly or unguarded things, in court and indeed out of court. We can all recall from the newspapers when judges have failed to do so. Again, that is all part of a judge maintaining proper integrity, with appropriate sensitivity. The subject matter of most cases is serious and, although it is important for a judge to be able to put those in court at their ease (sometimes appropriately lightening the mood of a court), a judge has to engage his mind fully before speaking. Inappropriate levity can be devastating for those interested in the specific case, as well as undermining confidence in a particular judge or the judiciary as a whole.

However, a judge also requires a certain degree of robustness, and sometimes grace or at least a thick-skin. He will be criticised from time-to-time, for example on appeal or in the press. Some criticism may be warranted, some may not. A good judge will be able to understand the criticism that is warranted—and learn by it—and that which is not. The good judge needs to have broad shoulders, as well as an ability to ‘move on’. While any criticism is being made, a judge will have other judicial work to do.

To read a decision overturning your carefully constructed and (at least as you thought when you gave it) correct judgment, requires silence and good grace—attributes reflecting the need for a judge to work together with all sorts of people—including fellow judges and judges who deal with appeals.

Administrative attributes

A judge is involved in ‘administration’ in two senses: the administration of individual cases, and the administration of the justice system.

I have already touched upon the former. He is likely to have a certain 'box' workload, i.e. paper applications to deal with without a hearing. A judge therefore needs to be able to understand how cases are run, how court files are kept and how to identify the issues that will determine an individual case, to enable him to case manage his work. That, at every level of the judiciary from lowest to highest, requires a high level of industry, and at least some interest and understanding of judicial process. It also requires specific communication skills, for example the drafting of succinct reasons for refusing an application or permission to bring a claim or an appeal.

A good judge is also able to work constructively with others, and, as I have already mentioned, this includes working with, and certainly learning from, other judges but also to work well with staff. The staff I have worked with over the last 15 years as a judge have been helpful and tremendously supportive of the judges they serve. They are often better than we deserve. I hope I have properly recognised that. A good judge would do so, and support them when they require it.

Similarly, in the broader administrative role within the justice system, judges are increasingly asked to work with civil servants, on all sorts of projects. That work requires a wide spectrum of attributes: independence and an ability to fight the judicial corner; an ability to cooperate and compromise; and judgment to know when to hold and when to compromise. These are the attributes more usually attributed to a business manager than a traditional judge, but they are increasingly important for some judges in the judicial leadership roles they perform.

Conclusion

The paradigm judge is therefore robust and patient, sensitive and thick-skinned, enthusiastic and cautious, a committed lawyer and someone who does not spend his time exclusively with the law, an independent thinker who works well with others, someone who can decide the most complex points of law but

also deal efficiently with a list of paper applications and administer a court or tribunal centre.

Although occasionally a judge forgets that this is the case, no judge is perfect. No judge has all of the attributes I have identified. Nor, thankfully, is the judicial system dependent upon every judge being equally and similarly gifted.

While some attributes are essential in any judge—for example, sensitivity to those around them, and good judgement—judicial work is diverse and different judicial posts require different qualities. Some judges sit every day in court during court hours, while others do most of their work on paper in their room or even at home. Some judges do virtually no administrative work, a few do almost all administration. Some judges are occupied primarily in fact-finding, whereas others deal exclusively with the law. The attributes I have identified are not required in equal measure in every judicial post. There is no single paradigm.

Consequently, those with a vocation to be a judge will be able to identify judicial posts that better suit their own character and qualities. The other side of the coin is that the strength of our judicial system lies, not in the attributes of a single judge, but in the attributes of the cohort of the judiciary as a whole.

I know that judicial diversity is dealt with elsewhere in this book. However, it is relevant here.

There are several reasons why diversity within the judiciary is important. One reason of course is that it is important that anyone of merit who wishes to be a judge has the same opportunity of becoming a judge. Equal opportunity has historically been the driver behind judicial diversity, and it remains crucial.

However, judicial diversity is also important because people from diverse backgrounds bring with them into the judiciary their own experiences and expertise. That adds to the strength of the judicial cohort as a whole. That is another reason why it is vital that there are women and members from all ethnic groups on all levels of the bench. And, particularly for these purposes, diversity is itself a broad concept. To benefit from the different

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attributes that varied experience brings, the bench needs not only to reflect gender, ethnic and age diversity, but also draw from lawyers with differing experience. The Bar, solicitors, academics and employed lawyers are likely each to have their own particular professional and administrative strengths by dint of their previous experience.

The judiciary is not made up of judges with identical attributes—nor should it be. The system should take and make the most of the qualities that each judge has to offer, so that the judiciary as a whole is stronger than the sum of its parts. From that, those of us who are only too well aware of our own deficiencies as judges may take considerable comfort.

The Judiciary: Why Diversity And Merit Matter

Shami Chakrabarti CBE

Shami Chakrabarti has been Director of Liberty (The National Council for Civil Liberties) since September 2003 having first joined Liberty as an in-house counsel in 2001. A lawyer by background, she was called to the Bar in 1994 and worked as a legal adviser in the Home Office from 1996 until 2001. She is Chancellor of Oxford Brookes University, a Governor of the London School of Economics, a Visiting Fellow of Nuffield College, Oxford and a Master of the Bench of Middle Temple.

“... I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.” - From the Judicial Oath

The judiciary is no ordinary senior profession. It constitutes the third pillar of our unwritten constitution and the bedrock upon which the rule of law is founded. Thus its competence, integrity and legitimacy are matters not just of public interest but of societal survival. Arguments about who sits in this vital and necessarily un-elected seat of influence are therefore both more important and complex than those that permeate debates about equal opportunity elsewhere in the world of work. If a company's employees seem all to come from a narrow background, its customers may ask questions, flex consumer muscle or perhaps feel altogether indifferent, as long as the goods or services provided are of acceptable cost and quality. If elected politicians are overwhelmingly white,

male, heterosexual, able-bodied and from privileged financial backgrounds, we voters have arguably only ourselves to blame. If medical or educational professionals are perceived to be too homogenous, issues of empathy, communication, example and even trust may eventually arise.

These concerns become so much more acute in the case of the judges—those who quite literally sit in judgment over people and institutions from the youngest ward of court to multi-national companies and the Government of our country. Further, if protagonists (willing or otherwise), in hotly contested legal proceedings lack confidence in their particular tribunal or the institution as a whole, there is rightly and necessarily, limited scope for comfort or redress. Lives, livelihoods, reputations and policies are won and lost in the courtroom. Further the esteem in which the judiciary is held is in a sense, its ultimate and possibly only real sanction. In a fast-changing and often irreverent society, those who see the independent judiciary as vital to the rule of law and democracy itself must surely do everything possible to maintain and enhance its competence and legitimacy.

To aspire to both diversity and merit in the composition of the judiciary is mercifully less controversial than it once was. It does not seem so long ago that a bright white male middle-aged friend in silk told me that if judges must now better reflect the diverse society they serve, “you might as well appoint mental defectives to the bench”.

This outburst no doubt came from an understandable and human sense of threat. If any professional pool of talent is widened so that doors that once stood as barriers are unlocked to candidates from broader backgrounds, the traditional beneficiaries of the narrower path to preferment inevitably lose out. There is no escaping that. However, that is quite different from suggesting that ‘diversity’ and ‘merit’ as characteristics of the modern judiciary, must stand in inevitable and constant tension in the oldest unbroken democracy on Earth. The assumption is obvious and in many cases instinctive. The status

quo constitutes 'meritocracy' and any move towards diversifying the gender, ethnic, socio-economic etc. composition of one of the most important institutions in society must necessarily involve a diluting of standards; a 'dumbing down' of what it is to be a good arbitrator; in short—'political correctness gone mad'.

Challenging such an instinct requires more than an instinctive response. It requires unpacking and exploring previously assumed notions of both 'merit' and 'diversity'. It means looking more deeply at the role of judging and the rule of law in a democracy like Britain. It means looking at threats and opportunities for independence and legitimacy in the long term as well as the immediate embarrassment to individual justice and public perception posed by such a slowly evolving judiciary.

Merit

Arguing that judges should be appointed from the 'less well-qualified' is like suggesting that anyone would wish to receive a life and death operation from a health professional chosen for reasons other than surgical skill. However, what if the current flow of likely candidates to the bench, and senior judiciary in particular, has been so clogged by advantage, disadvantage and untested assumption (be it on the part of the feeder professions rather than judicial appointments in isolation), that there can be no real confidence that centuries of self-replicating professionals from the same gender and social strata were always the most suitable people to serve in the judicial branch? Conversely, what if some of the particular bars to access to this limb of the constitution that have developed as a means of whittling down the field in a time of more fierce competition, hinder diversity without necessarily producing judges of greater merit?

We have all heard the stories of great jurists of yore who achieved distinguished and enduring careers that began with a less than perfect degree. Some react to these tales with obvious resentment at the privilege and nepotism that for so long seemed to trump even academic prowess in a number of our

great professions. The resentment is well-placed, but surely there is also room to reflect that if even privilege and nepotism might have occasionally thrown up an excellent judge from an apparently unorthodox or surprising academic or intellectual platform, there may be more to merit than meets the eye.

Professor Kate Malleson of Queen Mary College points out that to some extent, merit is always defined, at least in part, by reference to the likely and desired available pool of candidates¹. Qualifications for various manual employments were altered to achieve women filling in for their servicemen brothers and husbands during World War II. After the end of the war, old rules resumed—no doubt to achieve the smooth and harmonious re-integration of former military personnel into civilian life. She goes on to point out that the relatively small number of relevant PhDs prevents this qualification becoming a pre-requisite to serving as a judge. As it happens, I suspect most of us would see the obstacle to socio-economic diversity that the requirement of a post-graduate course of academic study that can take up to six years would constitute. Further, few of us would argue that academic research of such a focussed, in-depth and potentially obscure nature should be the only indicator of judicial potential. Malleson's points are vital to this discussion. First, any employer will tell you that fairer more innovative appointments processes involve the encouragement and assessment of a broader pool of applicant. Secondly, merit is a term so easy to bandy about, but it is vital that we give detailed and constant scrutiny to what it means in the field of judicial appointment.

After a six month consultation with a wide range of organisations, the Judicial Appointments Commission articulated the following list of the key qualities and abilities required by those in judicial service:

- Intellectual capacity—analysis and appropriate knowledge of the law;

1 K. Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 J. of Law and Society 126-140.

- Personal qualities—integrity, sound judgement and decisiveness;
- Understanding and the ability to deal fairly with people;
- Authority and communication skills; and
- Efficiency

In the words of the Chairman Baroness Prashar: “Merit is at the very heart of this and diversity is integral to it.”²

At least two of the five characteristics or aptitudes cited above involve some degree of subjective quality likely to be affected by personal background or experience or by constant exposure to peers and colleagues from a diverse pool.

Diversity

When considering the value of social ‘diversity’ to the bench, it is important to remember that while we tend to think of judging as a rather solitary exercise, the judiciary is an institution rather than an individual dispensing and being seen to dispense justice year on year to society as a whole. It goes without saying that a person of one racial or social group or gender should be capable of acting fairly to people across the board. Nonetheless, when senior judges must determine whether racial profiling is permissible in certain security contexts or whether faith conviction can ever justify discrimination against gay people, both litigants and potentially influential observers begin to ask questions about the personal qualities and attitudes of those sitting in judgement.

These questions are often far from innocent and dispassionate and sometimes come from powerful interests who wish to undermine the checks and balances provided by independent judges and the legitimacy of the rule of law itself. How many times over the past 20 years have we heard populist politicians and national newspapers questioning the authority of the ‘toffs

2 Baroness Prashar, *Working Together for a More Diverse Judiciary: Achieving Results* (2nd Bar Race Relations Lecture, 20 November 2007, London, UK)

in wigs' to restrain executive power? More recently, the ranks of those who dispute that justice can be blind and even-handed have been joined by none less than a retired Archbishop of Canterbury³. It seems to me that if we are to continue to fend off attempts to politicise the senior judiciary and compromise its independence by way of personal scrutiny of individual judges, it is more important than ever that the make-up of the collective judicial body can be defended to a modern audience.

Further, the importance of appeals, precedent, general legal discourse and the nature of public perception and scrutiny mean that a greater diversity of composition could benefit both the competence and legitimacy of the institution as a whole.

Legal and intellectual experience, knowledge and agility must of course be requisites for judicial service. However, these qualities are not the preserve of the independent Bar as opposed to the solicitors' branch of the profession or even litigation practice per se. Further the senior ends of both of these strands of the legal profession taper quite narrowly from an equal treatment and diversity point of view. It may be worthy of note that the United Kingdom's most senior woman judge came from an academic rather than a litigation background and that academia potentially offers a more diverse or at least gender-balanced pool of potential talent and aspiration at the senior end.

Then there are the skills and qualities that more obviously and directly benefit from broader life experience and association. Empathy, life (as opposed to legal) experience and communication can all be vital assets on the bench. The same is true of knowledge of areas of the justice system not always associated with the intellectual and financial elites of either the Bar or Solicitors' profession. Legal aid and police station practice are obvious cases in point, but there is a whole wealth of extra-legal life and work experience that could benefit the holders of judicial office in addition to the litigation and advocacy achievements traditionally valued. Diversity in the composition of the bench

3 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

should not be limited to obvious and vital issues of gender, race, sexuality, physical ability and degrees of privilege.

The later entrant to the law, who worked in a range of lay occupations first, may well bring a different and broader understanding and communication to the star advocate who has won and lost many leading cases but rarely had to understand or communicate with the most vulnerable among us. Similarly, there may be those (including many women), who have served with distinction in specialist tribunals who might have much to contribute to the senior judiciary. To return briefly to the analogy of the consultant surgeon, of course we want her to have the brain of a scientist and the hands of a virtuoso but when the news is bad and the decision difficult, we still hope for the empathy of a counsellor. Some might suggest that we demand too much but why should any particular combination of skills and qualities be impossible?

Conversely, there are many star advocates and litigators who by their own admission, struggle with the idea of making such a fundamental shift in the nature of their work as the expected crowning moment in a career. The pugnacious and intellectual courtroom fighter on one side of a case is not necessarily the natural and dispassionate arbiter of the increasingly polycentric problems we ask our judges to solve. Though many adapt with great and admirable ease, my argument is that the competence of both individual judges and of the judiciary as an institution may in the end be enhanced, by a broader approach to what constitutes potential and merit.

Legitimacy

So far from being mutually exclusive virtues, diversity and merit are capable of enhancing the competence of judging on an individual and institutional basis. However, as I suggested earlier on, competence in the judiciary must be combined with legitimacy, if the institution is to survive and prosper as a robust caretaker to the rule of law so central to the preservation of every aspect of democratic society.

In a recent televised exchange about proposals for the election of police chiefs, I asked two prominent Members of Parliament if they would also seek to elect the judiciary⁴. Both (including one now serving in the Cabinet), agreed that this might be an idea and in any event preferable to judging by ‘appointees’ or ‘experts’. These are highly educated and influential members of our political community. If they would even contemplate the idea of so blurring the lines of justice and politics, there must be a serious job of public education and perception building to be done on the part of those of us who jealously defend the independence of the judicial branch.

In the end, I have no doubt that saner counsel will prevail and that the polity will re-learn the importance of both elected and independent elements of a democratic constitution. In any event, while there may be a lack of language to articulate instinct, I have no doubt that the general trust index for independent judges is very high and that people understand the importance of straining to keep electoral politics out of individuated justice. As societies elsewhere in the world constantly demonstrate, a country without the enduring values of fundamental rights and freedoms and the rule of law protected by an independent judiciary will not stay democratic for long.

Nonetheless it would be a lot easier to defend the integrity and legitimacy of the independent judiciary from populist and so-called ‘democratic’ challenge, if it were at least a little more demographically representative. Public interest in the general composition of the bench is understandable and fair. Dismissing it or failing to address understandable concerns provides a gift to the distorting lens of parts of the media and ultimately to others who would rather that fiercely independent judges did not hold the powerful to account. Simultaneously, any hint of instant fixes or tokenism in the context of appointments would leave the institution equally open to successful attack.

4 BBC One, ‘Question Time’ 15 April 2010

Judges make some of the most important decisions in the life of the nation and lives of its people. By and large they do so with a degree of wisdom, humility and integrity that has prevented a crisis of confidence or legitimacy and provided stability and social cohesion in the most testing of times. They rule on matters of life, liberty and a whole range of competing individual and societal interests. Those they protect must have confidence that judgments however difficult or unwelcome, are at least formulated without prejudice and with a broad human and societal understanding. A more diverse and ever-more competent bench will only further build that confidence over time.

Judicial Appointments: Balancing Independence, Accountability and Legitimacy

Encouraging and Supporting Those Aspiring to be Judges

Her Honour Judge Frances Kirkham

Frances Kirkham started her career as a solicitor. She became a Senior Circuit Judge in October 2000 and is the designated Technology and Construction Court Judge in Birmingham. She founded the West Midlands Association of Women Solicitors and is a founder member of the United Kingdom Association of Women Judges. She was appointed to the Judicial Appointments Commission in January 2006.

How do you become a judge? Myths abound. You will often hear it said that you must be a barrister, you must be an advocate, you have to be at least 40, and you need a judge as a referee. All of these are incorrect.

In general terms, barristers, solicitors and Fellows of the Institute of Legal Executives (ILEX) are now eligible to be appointed as judges and tribunal members. It was not always so. Historically, so called secret soundings were taken, from existing judges and the profession, which led to a person being invited to become a judge (sometimes described as being ‘tapped on the shoulder’). Judges therefore tended to be appointed from the ranks of those who appeared frequently as advocates in the courts. It was rare for women and solicitors to be appointed. The process undoubtedly produced fine judges, but it is now generally accepted that the judiciary should be more diverse than has previously been the case.

One of the Judicial Appointments Commission’s (JAC) statutory obligations is to “have regard to the need to encourage

diversity in the range of persons available for selection for appointments.” This obligation is subordinate to the statutory obligation to select only on merit people of good character. So, it can immediately be seen that the JAC does not select people on the basis of their gender, colour or professional background. There are no quotas and no positive discrimination. Indeed, there is little appetite for such an approach: most want to feel that they have been selected for appointment because they are the best person for the job.

The JAC has, from its creation, worked to encourage applications from as wide a range as possible. The first part of this article outlines the steps which the JAC has taken and is still taking to do this. The second part offers some advice to those who are considering making an application for appointment as a judge or tribunal member.

The JAC’s work

It is not possible to create a diverse judiciary unless the profession, from which judges and tribunal members are drawn, is itself diverse. Since 2006, the JAC has focused on working with the profession to encourage people from a wide range of backgrounds to apply. It is only by cooperation that progress towards a more diverse judiciary will be made.

The new approach to selecting judges has the advantage of fairness and means that appointment is open to a wider pool. But those from a non-traditional background do not necessarily have a built-in support network. The JAC has developed good working relationships with a number of professional bodies to encourage establishment of such networks. The main bodies, such as the General Council of the Bar (the Bar), the Law Society and ILEX, have engaged enthusiastically, as have a number of smaller specialist professional groups.

The JAC organises at least 30 candidate seminars every year, many of these targeting currently under-represented groups. Speakers at such events usually include JAC staff, a judge or

tribunal member, a Commissioner and panel chair. The JAC staff and Commissioner describe in detail the selection procedures. The judicial members are able to give first-hand experience of the selection process and of being a judge. The panel chairs are able to give invaluable advice about the selection process, including help with interview techniques. The feedback from these events has been excellent.

The JAC has offered practical help to the professional bodies. This has included, for example, participation in workshops with specialist groups such as the Black Solicitors' Network, working with the Law Society to create a video of the sort of role play used in the assessment process and working with the Bar to establish diversity mentors on each circuit.

The JAC established a Diversity Forum. Its purpose is to bring together key interested parties to make a concerted effort to improve diversity in the profession, and to achieve this by co-ordinating existing activities and by identifying new opportunities for action. Senior figures in the profession and representatives of other key interested parties meet regularly, and there has been a useful exchange of ideas. The JAC recognises that this needs to be more than a forum for the exchange of ideas. Ideas need to be translated into action, and it is encouraging that this has indeed happened.

The JAC held a half day diversity seminar in July 2009. This was attended by representatives of the judiciary, the profession and diversity groups. The focus was on practical measures to help encourage applicants from non-traditional backgrounds to prepare for and apply for judicial appointment. Agreement was quickly reached on steps which could be taken forward immediately.

Non-statutory eligibility criteria can have the effect of limiting the pool of people eligible to apply for some posts. The JAC has worked with the Ministry of Justice (MoJ) to ensure that such criteria are imposed only after careful consideration. The MoJ will normally require a candidate for a salaried post to have had previous judicial or tribunal experience, for example sitting on

a fee-paid basis as a deputy. This means that an exceptional candidate who has no previous experience can be selected, and the JAC has made selections of that type that the Lord Chancellor has accepted and appointed.

Salaried part-time working is now available for a wide range of judicial and tribunal posts. The JAC seeks to ensure this is offered whenever possible. A woman with caring responsibilities, for example, may be attracted by a salaried position that allows her to work three days a week. The fact that an applicant has asked to be appointed on a part-time basis will not be revealed to the interviewing panel or indeed until after the merits of the applicant have been assessed.

Although it is a while since the loss of the Bar's historic monopoly, it has taken a long time to achieve recognition that solicitors are eligible to apply for appointment and may become very good judges. Solicitors in private practice face a problem which is not encountered by barristers in private practice. Barristers' chambers are proud of any member who gains a judicial appointment. But few firms of solicitors consider that it brings value if one of their partners or employees sits as a judge. Indeed, many firms go so far as to discourage their people from applying. For many solicitors, there is a real risk of career blight if it is known they are considering applying for a judicial or tribunal post. The JAC has held meetings with managing and senior partners from some of the larger firms to help them understand the potential benefits of allowing their people to apply for judicial appointment. Those solicitors who sit on a fee-paid basis (typically, for between 20 and 30 days a year) find their practice as a solicitor improves immeasurably as a result of their experience of sitting as a judge. This experience can be passed on to other members of that solicitor's team. Clients often gain confidence in a solicitor who sits occasionally as a judge. For many firms retirement from full-time practice in one's 50s is the norm. It can benefit all if a solicitor is encouraged at that stage of their career to bring their skills to a new job.

The JAC is also working with the Law Society to communicate the potential benefits to firms of solicitors if they encourage their people to apply for judicial appointment.

ILEX has very quickly spread the word among its members and the JAC received applications from ILEX Fellows as soon as they were eligible to apply. As many Fellows are employed by firms of solicitors, to express an interest in judicial appointment may result in them experiencing the same career blight. However, it is very encouraging that the JAC has recently selected the first ILEX Fellow for appointment as a Deputy District Judge.

As a result of the work of the JAC and key interested parties, there is now greater awareness throughout the profession of the possibility of judicial appointment. The very existence of an independent body making selections in a fair and transparent way has encouraged some to apply. Many candidates who would not have applied under the old system because they were not from a traditional background now believe that their application will be treated fairly.

However, many applicants are still reluctant to apply. There are a number of reasons for this, including matters over which the JAC has no control, such as the working conditions for a particular post. In many cases, people are reluctant because they lack the confidence to apply. For example, in-depth anonymous interviews with potential High Court judges published in 2009 showed that even high-flying barristers are sometimes reluctant to put themselves forward.

The challenge for the future, for the JAC, the judiciary and the profession is both to encourage good applicants and to help would-be candidates to assess their prospects realistically, so they do not apply too early or for posts for which they are not yet suited.

How to improve prospects of success

At every candidate seminar the JAC seeks to cover the main steps in the application and selection process. The audience may vary but the questions and areas of concern are often similar and all want to know how to give themselves the best possible chance of success—especially as the JAC can often receive, on average, ten applications for every available vacancy.

Every candidate should give careful thought to the following five matters.

1. Before application—preparation and research

The key is thorough preparation through all stages of the process. Candidates should not underestimate the rigours of the process and not wait until the last minute to apply.

When thinking about the possibility of becoming a judge, people need to ask themselves if they have the experience and qualities needed and if life on the bench would suit them. Serving judges speak of the satisfaction offered by a judicial post, including the opportunity to be the decision-maker, the intellectual challenge, public service, prestige, financial security and the warm collegiate environment, but a judicial role is not for everyone. For anyone wanting to find out more about the role the Judicial Office runs a work shadowing scheme that offers an opportunity to experience the challenges, pressures and rewards of running a court and making decisions that affect people's lives.

The JAC advises anyone interested in applying for a judicial role signs up to receive the JAC e-newsletter *Judging Your Future*, which tells candidates which exercises are to be run and when, and to receive email alerts for relevant selection exercises.

It can be helpful to attend a JAC outreach event or session organised by professional bodies or specialist interest groups. This gives some insight into the work of the courts or tribunals, and guidance on the application process.

Prospective candidates need to give careful thought to the sort of job they want and consider the wide range of posts available. The JAC selects for more tribunal posts than for court appointments. Tribunal work can be fascinating and rewarding, and candidates should not underestimate the challenge and enjoyment they might experience if they tackle tribunal work. It is worth taking the time to observe the tribunal or court in question in session. The work shadowing scheme has proved very popular but it may be possible to find, informally, a judge or tribunal member to shadow for a day or two. Many judges and tribunal members are only too pleased to talk to would-be applicants about the job, and lawyers should not be shy about approaching someone sitting in the relevant jurisdiction to learn what the job actually entails

There is little point in applying for every job advertised: it is most unlikely candidates will have the necessary skills and abilities for so many different jobs. Self awareness is needed from prospective candidates to appreciate which jobs most suit their particular skills and experience.

Prospective applicants should ask a good friend or mentor (for example through a professional body) for realistic and objective advice about their ability to tackle a particular job.

2. Making the application

From the launch of a selection exercise a prospective candidate has three weeks in which to submit a completed application form. The application form plays an important part in the selection process so all sections of the form should be completed, ensuring the information provided is clear and accurate.

Examples of previous application forms can be found in the current selection exercise section of the JAC website. There is a tailored application form for every exercise but they each follow a similar format.

Self Assessment

The JAC looks for evidence of past behaviour as the best indicator of likely future performance. Applicants are asked to write two pages of self assessment. Candidates say they find this daunting but the JAC is simply asking for a candidate's own evidence and examples of why they believe they would be suitable for the job.

Writing a good self assessment takes time. Compiling information to use should be done far in advance. Many people say they have found it helpful to keep a log or scrap book containing notes of any experience or incident which provides an example of behaviour demonstrating one or more of the qualities and abilities.

Examples need to cover all the qualities and abilities and the supporting behaviours for the post in question. Candidates should be aware of the difference between an example of behaviour which demonstrates one of the qualities and abilities and mere assertions: assertions will not suffice. There is no requirement to give examples only from professional life.

Candidates should use what they feel are their strongest examples on the application form. Others that are relevant can still be used if required as additional evidence at the selection day.

It can be helpful if a friend or mentor is asked to read an application form before it is sent to the JAC.

Transferable Skills

With applications for posts in unfamiliar fields, the self assessment must identify those skills which show a candidate will be able to tackle the role. Transferable skills need to be identified. This may, for example, comprise relevant experience as a result of sitting as an arbitrator or adjudicator, acting as a mediator, or chairing meetings of a board of trustees or school governors, or within a partnership or chambers. Such experience may provide evidence of a person's ability to run

a court, allow appropriate discussion so that all have their say, sum up the arguments and points made and to reach a reasoned conclusion.

Referees

The JAC will approach one referee. This will usually be, for employed lawyers, their line manager; for barristers, a head of chambers; and for solicitors and legal executives, a firm's managing or senior partner. This can present problems for solicitors, who may not want their firm to know that they are applying. If that is the case the JAC will assist by finding another person to act as the nominated referee.

Candidates are usually invited to nominate three referees. There is no hierarchy in referees. Nothing will be gained from citing a referee who is an eminent person who is able to say only that they know little about the candidate. The purpose of references is to provide the JAC with information about a candidate's track record and transferable skills.

References are considered with all other information about a candidate. The weight given to a reference depends on the quality of the information it provides.

It is helpful to warn referees they have been nominated so they will be available when the JAC seeks references.

Each referee should be given the published information about the job which will explain what the JAC is looking for so the referee can tailor the reference accordingly. A helpful reference will give examples of performance or behaviour in relation to each of the qualities and abilities. Candidates may therefore want to remind nominated referees of something which will help jog a memory, for example about a particular piece of work or incident.

3. Shortlisting

The JAC has adopted qualifying tests as an objective method for taking shortlisting decisions for most selection exercises up to and including circuit bench. Those are designed to assess candidates' ability to perform in a judicial role, by analysing case studies, identifying issues and applying the law.

There is a dry run of every qualifying test. Candidates can volunteer to help the JAC at the stage when it is developing a test paper. If they help in this way then of course they cannot be permitted to make an application for that particular post, but the experience gives the opportunity to sharpen exam technique and gain an idea of the approach the JAC takes on testing.

Feedback

While the large number of applications received means that the JAC cannot provide individual feedback following a qualifying test, the JAC understands that candidates wish to understand how well they performed so that they can improve their performance in any future application. So the JAC now publishes on its website a qualifying test feedback report for each exercise. The report provides general comment on how candidates performed in the test including the general standard of scripts, the range of marks awarded, where candidates performed poorly, and the identification and analysis of common problems.

4. Selection Day

It is the policy of the JAC to invite people through to selection day in a ratio of between two and three candidates per vacancy. A selection day may consist of an interview or an interview and role play.

The interview panel will ask questions related to each of the qualities and abilities for the post. There will be no trick questions. The panel may ask for further examples of behaviour additional to those given on the application form so candidates

should re-read their submitted application form and information about the role sought.

As part of the training of selection panels, the JAC runs mock interviews. Candidates can participate as a 'mock' interviewee in such a training session although, as with the 'mock' qualifying tests, they will then not be eligible to apply for that particular exercise.

Role play exercises often simulate a court or tribunal environment. This is where it helps to have observed the relevant court or tribunal in advance to gain an idea of what is expected of the judge or tribunal member. In the role play the candidate is in the 'hot seat' from the moment they walk through the door. As the judge or tribunal member, they will have to control proceedings and deal with the situation as it unfolds.

5 . Decisions

The JAC writes to candidates to tell them the outcome of their application. It receives substantially more applications than jobs available. So, many candidates must prepare for disappointment. Many candidates have been so successful throughout their academic and professional lives that they have never 'failed' an examination. Many find it very difficult to come to terms with not being selected. The fact of non-selection does not necessarily mean that the person is not a good lawyer or advocate or would not make a good judge. It may simply mean that others have done better on that occasion. Unsuccessful candidates at the selection day stage of the process can request written feedback. Acting on that feedback can often mean a stronger, performance in a subsequent application. Unsuccessful candidates should remember the old adage of 'if at first you don't succeed...'. Many unsuccessful candidates do think carefully about their personal development, and some are ultimately successful at a later date.

Judicial Appointments: Balancing Independence, Accountability and Legitimacy

How the Judiciary is Changing

Lady Justice Hallett DBE

Dame Heather Hallett was called to the Bar in 1972 took silk in 1989 and began sitting as a part-time judge in 1985. She was Chairman of the General Council of the Bar in 1998, and has been a High Court Judge and Presiding Judge on the Western Circuit. In 2005 she was appointed to the Court of Appeal. She was the Vice Chairman of the Judicial Appointments Commission from November 2007 to July 2010 and is currently Chairman of the Judicial Studies Board.

For much of its history, the judiciary was a small, apparently homogenous group. It was, as Professor Malleon put it, made up of “elderly, white, male barristers educated at private schools and at Oxbridge¹”. This was a truth underlined, self-mockingly, by Lord Hoffmann in 1996, when interviewed by the legal writer Penny Darbyshire:

“Darbyshire: ‘Are you at the Bar, then?’

Lord Hoffmann: ‘No, I’m a Law Lord’

Darbyshire: ‘Ooh, sorry!!’

Lord Hoffmann: ‘That’s OK. I’m one of the old, white, male geezers.’”²

- 1 Malleon, in Malleon & Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, (University of Toronto Press) (2006) at 42; The Report of the Advisory Panel on Judicial Diversity 2010 (MOJ, 2010) (the Neuberger Report) (<http://www.justice.gov.uk/publications/docs/advisory-panel-judicial-diversity-2010.pdf>) at 14; cf, Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges*, (2003) (Cmd. 10/03), foreword.
- 2 Darbyshire, *Darbyshire on the English Legal System*, (Sweet & Maxwell) (2008) at 399.

But, as Bob Dylan might have put it, the judiciary is a-changing. It has been changing for the past 20 years; it has been particularly changing as a consequence of a number of statutory reforms enacted in the first decade of the 21st century.

The most significant of those reforms was the creation of an independent Judicial Appointments Commission (the JAC), which sprang into life in 2006. The JAC has a statutory duty to encourage the widest, most diverse, pool of eligible individuals to apply for judicial appointment and to appoint the best from them on merit. There have been other reforms that have had, and will, in future, have a positive effect on the judiciary's diversity. In this chapter I explore the ways in which the judiciary is changing. In doing so I examine the following: structural change, cultural change, and diversity.

Before looking at these issues, it is useful to note one very important caveat. The judiciary might be changing, so as to become more diverse, in a number of ways, but there is one true constant which underpins, informs, and to an extent limits change: merit. First, merit underpins reform because only the widest pool of eligible talent permits the appointment of the most meritorious. As Lord Clarke of Stone-cum-Ebony put it recently: "It is in everyone's interest to have the widest possible pool of talent from which appointments can be drawn. To borrow a phrase it is better to be first in a field of many, than first in a field of one³." Greater diversity thus breeds greater merit.

Second, merit informs the reform process. If we are to ensure that the widest field of talent is available to the appointments process, positive steps are required to bring that talent forward. The appointments process must target, educate and inform all those eligible to apply not only that they are eligible for specific posts, but that their application is positively desired. Greater competition assessed on merit will ensure we have a judiciary

3 Clarke, *Selecting Judges: Merit, Moral Courage, Judgment & Diversity*, The High Court Quarterly Review (Vol. 5, No. 2) (2009) 49; (<http://www.judiciary.gov.uk/docs/speeches/mr-selecting-judges-lecture-22092009.pdf>) at [36].

ever more fit for a liberal democracy committed to the rule of law in the 21st century.

Third, merit provides a limit on reform. Merit must remain the sole criterion for appointment as a judge or we run the risk of undermining public confidence in the judiciary and our commitment to the rule of law. At the same time we hope to see a judiciary which is properly reflective of the society it serves. Given we do not have a career judiciary from qualification in the United Kingdom, a system of appointment on merit will struggle to produce a diverse judiciary so long as the legal profession from which judges are drawn is not properly reflective of our society's diversity *at every level*. With these points in mind, I turn to how the judiciary is changing.

Structural Change

What do I mean by structural change? There are a number of elements to this. In the first instance the judiciary is no longer a small, relatively homogenous body. The days of 39 High Court judges and Commissioners of Assize processing round the country are long gone⁴. Over the last fifty years the court-based judiciary has grown in number at a pace no-one could have imagined. Today, for instance we have 640 Circuit Judges⁵. In 1969 the best proposal for future need concluded we would need no more than 150! In 1972 there were a mere 287 Recorders. Now there are 1,235⁶.

The growth in numbers evident here has also been matched by growth and reform in the tribunals-based judiciary. Since the Franks' Report on administrative tribunals and enquiries in 1957, there has been an almost exponential growth of tribunals and tribunal-based judiciary. From a limited number of tribunals in

4 There are now 109 High Court judges. Commissioners of Assize were replaced by the Crown Courts in 1971.

5 Judicial and Court Statistics 2008 (Cm 7697) at 179.

6 Zander, *Cases and Materials on the English Legal System* (9th edition) (Butterworths) at 15; Judicial and Court Statistics (Cm 7697) at 169.

the pre-Frank days we now have a reformed, restructured tribunal service made up of the First-tier and Upper Tribunal. Sitting in those tribunals are approximately 5,133 tribunal judges⁷.

The growth in numbers of both court and tribunal-based judiciary, and the recent reform of the latter's structure, has had a profound effect, presenting as they do, far greater opportunities for appointment. In particular they offer far greater opportunities for individuals from a wide-range of professional legal backgrounds to gain fee-paid experience at entry level. It does not simply offer greater opportunities for those who would traditionally have applied. Two further structural changes have had a significant impact. First, a wider range of legal professionals can now apply for some positions, for example Fellows of the Institute of Legal Executives (ILEX), patent and trade mark attorneys and academics. Second, advocacy experience is no longer, as it once was thought, a necessary condition of appointment. Alexandra Marks, a solicitor with no advocacy or contentious litigation experience, for instance, has recently been authorised by the President of the Queen's Bench Division, Sir Anthony May, to sit as a Deputy High Court judge⁸. Finally, since 2007, professionals can apply earlier in their careers than ever before for an entry-level fee paid post⁹.

Taken together, these four structural changes—growth and restructuring of the judiciary, an increase in entry-level fee paid posts, broadening out of the eligibility criteria and enabling those eligible to apply earlier in their careers—provide the conditions for a perfect storm of positive change. They enable a wider range of individuals than ever before to find out if the judiciary is suited to them and if they are suited to the judiciary. They enable greater flexibility and opportunities for part-time working to exist than was the case in the past, thus enabling

7 The Senior President of Tribunals' Annual Report: *Tribunals Transformed* (February 2010) at 30.

8 <http://timesonline.typepad.com/law/2010/04/woman-among-three-solicitor-deputy-high-court-judges.html>

9 Tribunals, Courts and Enforcement Act 2007 schedule 10, part 1.

individuals with other responsibilities to apply and carve out successful judicial careers. The greater links between the courts and tribunals which now exists also builds on this opportunity. The opportunity for experience gained in one branch of the judiciary may be used to obtain appointment in other branches: tribunal judges, for instance, may now move over to the District/Circuit Bench and beyond, as well as moving from one tribunal to another. Change has given greater formalisation, and formal breadth, to the judicial career path.

Greater formalisation goes beyond greater interaction between the courts and tribunals. In the past the general picture saw a District Judge stay a District Judge and a Circuit Judge remain a Circuit Judge. Generally, a judge remained in the post to which they initially obtained appointment. This is no longer the case; as recent moves to the High Court from the Circuit Bench have shown¹⁰. Equally, Circuit Judges have come from the District Bench, and through the tribunals, as individuals gain their initial experience more widely and at an earlier stage in their careers.

Structural change does not end here: it is further reflected in a cultural change that has swept across the judiciary. It is to that to which I now turn.

Cultural Change

It may once have been true that life as a judge entailed “working in an old fashioned, fustian atmosphere, with old-fashioned, fustian colleagues.”¹¹ As Lord Judge stated in 2009, what once might have been true is far from even approaching the truth now. The 21st century judge and 21st century judicial life is anything but fustian. It is a diverse, flexible, rewarding and intellectually

10 For instance, G Williams J, W Williams J, Saunders J, Coulson J, Maddison J, MacDuff J and Hickinbottom J have all been appointed from the Circuit Bench since 2007.

11 Genn, *The Attractiveness of Senior Judicial Appointment to highly qualified practitioners*, (DJO) (2009) at 4, foreword by Lord Judge.

challenging life and one which is carried out in a more collegiate manner than the image of the judge sitting quietly in court during the day would suggest. Judges are no longer appointed and left to their own devices. The demands placed on the modern judge do not permit of such splendid isolation.

Judges today have to be far more business-like and professional than ever before. The constitutional changes introduced by the Constitutional Reform Act 2005 have meant the ever increasing involvement of judges in the administration of justice—the actual running of the courts and tribunals systems. The introduction of case management, initially in civil justice as a consequence of the Woolf reforms in the 1990s and now common across all fields, requires judges to work collaboratively with parties to litigation to ensure that claims are properly prosecuted to trial and judgment, or settlement. It requires them to work actively rather than, as the traditional picture had it, to sit passively in court simply receiving what evidence and submissions parties made. It requires them to exchange ideas among each other both formally, at training courses or through the various judges' associations¹², or informally via email over the Judicial Portal (a dedicated judicial intranet).

Today's more hands-on approach requires judges to demonstrate a host of skills—soft skills—which their predecessors would not have had to exhibit. Soft skills cannot exist in a fustian atmosphere. They call for a greater degree of training not just in black letter law but in case management, diversity awareness and fair treatment. The Judicial Studies Board's Equal Treatment Bench book has helped to transform attitudes to all court users and lawyers from black and minority ethnic (BME) backgrounds. The changing demands of litigation, and the changing nature of society, have required this cultural shift and the judiciary has properly changed to meet those demands.

¹² For instance, the Association of District Judges, the Council of Circuit Judges, the Magistrates' Association, the Forum of Tribunal Organisations, the Council of Appeal Tribunal Judges.

There has not simply been a cultural shift in the courtroom. The judiciary are now generally more accessible than ever before. Those interested in judicial office can sit with judges for short periods of time as part of the judicial work shadowing scheme, learning from direct experience what life as a judge is really like¹³. The Judicial Communication Office's panel of media-trained lawyers regularly appear, for instance, on the radio in order to explain decisions and clear away legal misunderstandings. Judges appear more regularly before parliamentary Select Committees, providing their insights on a broad range of justice issues to Parliament. At a more grassroots level, judges take an active part in legal education initiatives throughout the country, not least through the National Mock Trial Competition, which is run by the Citizenship Foundation and aims to give school children a real insight into our criminal justice system. This greater accessibility is something which cannot co-exist with old-fashioned attitudes and the out-of-touch seclusion of which the judiciary was previously suspected. There is, however, a third fundamental aspect of the cultural shift which the judiciary has undergone: diversity. It is to that I now turn.

Diversity

The judiciary historically reflected the demographic composition of the Bar. It drew its members, as the Advisory Panel on Judicial Diversity noted, from a small group of "well-educated middle-class white male barristers."¹⁴ Given this, it was hardly surprising that it took until 1945 for a woman to be appointed to a salaried judicial position, as a Stipendiary Magistrate, another 20 years until a woman was appointed to the High Court and a further two decades and more before a woman made it to the

13 <http://www.judiciary.gov.uk/workshadowing/index.htm>

14 The Report of the Advisory Panel on Judicial Diversity 2010 (MOJ, 2010) (the Neuberger Report) (<http://www.justice.gov.uk/publications/docs/advisory-panel-judicial-diversity-2010.pdf>) at 14; cf, Department of Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges*, (2003) (Cmd. 10/03), foreword.

Court of Appeal and the House of Lords¹⁵. It was also hardly surprising that it took until 2004 for the first BME High Court judge to be appointed¹⁶ or that it took until 1993 before a solicitor was appointed to the High Court, until 2007 until one was appointed to the Court of Appeal and 2009 before one reached the House of Lords/Supreme Court¹⁷.

These figures do not tell the whole story. Women now constitute nearly 20 per cent of court-based judiciary and 37 per cent of tribunals-based judiciary. Individuals from a BME background now constitute 4.5 per cent of court-based judiciary and 10.5 per cent of tribunals-based judiciary¹⁸. It must, however, be acknowledged that diversity figures remain low towards the higher reaches of the judiciary¹⁹. Given the structural changes that are now in place, and have been in place since the JAC was created, these figures will become ever more historic over the next decade. Opening out the appointments process enables those who have come to law from a non-traditional background to enter the judiciary. Excellence and the qualities which make a good judge can be found in many different places, whether it be in-house, in local or central government or in traditional private practice, among barristers, solicitors, and ILEX Fellows, other legal professionals and academics, among those educated at Oxbridge, at other universities or at no university at all. Drawing on a wider, more diverse pool not only increases competition and increases the quality of those appointed on merit, it will further

15 Sybil Campbell (1945); Elizabeth Lane (1965); Elizabeth Butler-Sloss (1998); Brenda Hale (2003).

16 Mrs Justice Dobbs.

17 Lord Justice Sachs (1993); Lord Collins (2007, 2009).

18 Neuberger Report (2009) at 15. These figures can be contrasted with: i) women make up just over 50 per cent of the general population; ii) individuals of BME backgrounds make up just under 9 per cent of the general population, see Office of National Statistics, 2001 Census, cited in Neuberger Report at 15.

19 Women: 1 Supreme Court Justice; 3 Lady Justices of Appeal; 17 High Court judges. BME: 3 High Court judges: see figures at <http://www.judiciary.gov.uk/keyfacts/statistics/index.htm> (updated to 19 April 2010).

the progress of judicial diversity. Diversity may still be a work-in-progress, but given the structural and cultural changes made to the appointments process significant progress can be expected.

Conclusion: The Pace of Change

The judiciary is changing in many ways, but is it changing fast enough? Probably not, the pace of change has always been slow, but there is a limit on what the Judicial Appointments Commission and the judiciary can do. There are a limited number of salaried judicial offices held until retirement. Entry into and progress through the profession, therefore, can only ever be incremental, arrived at following retirement of sitting judges—this will inevitably slow the pace of change. Further, the legal profession may produce vastly improved diversity figures on recruitment, but the problem lies in retention, for example, at partnership level in City law firms. A number of factors undoubtedly contribute to this (and I do not forget the impact of career choices of individuals), but the truth is that Lord Taylor CJ's expectation expressed in his 1992 Dimpleby lecture, that "the gender and ethnicity imbalance [would] be redressed in the next few years"²⁰ has been proved wrong.

The pace of change will to a large degree be dictated by the legal profession from which the judiciary is drawn. If the judiciary is truly to transform itself a concerted effort will have to be made by all its branches. If the judiciary is to draw its members from as wide and diverse a range of applicants as possible it requires the legal profession to ensure that it too is truly accessible to as diverse a range of individuals as possible. It too will have to ensure, consistently with the obligation placed on it by the Legal Services Act 2007, to protect and promote the public interest and the rule of law, that women, individuals from BME backgrounds, from non-Oxbridge backgrounds, from all socio-economic classes, whatever their sexual orientation and/or with a disability, join and thrive in the legal profession and

20 Taylor (1992) cited in Neuberger Report at 59.

from there the judiciary. For the pace of change to accelerate we all—judges, lawyers, the JAC, society as a whole—have a part to play, to foster what Lord Neuberger described as a “wealth of aspiration”²¹; a wealth of aspiration that is nurtured at all levels and is matched by a wealth of opportunity for all to succeed on the one and only true ground: merit.

In the last 10 years the judiciary has changed in many ways to promote that wealth of aspiration and opportunity. The JAC, in its relatively short life, has made a significant contribution to that change. Greater change will come over the next 10 years and our judiciary—our society—will be all the stronger for it. Much as we may treasure individuals and the contribution they have made to the justice system in this country, the optimists among us remain hopeful that the days of a judiciary drawn mostly from Lord Hoffmann’s “old, white, male geezers” are finally numbered.

21 Lord Neuberger, *Fair Access to the Professions*, (Herbert Smith—*The Times* Advocacy Awards 2009) (21 September 2009).

The Politics of Judicial Appointments in Canada

Graham Gee

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The 'politics' of judicial appointments run deep. Decisions such as who to appoint as judges and how to appoint them always have a 'political' dimension, no matter the jurisdiction under discussion. Because appointment processes shape the ability of courts to hold political institutions to account — and, in some jurisdictions, their ability to interpret constitutionally entrenched limits on legislative institutions — it could hardly be otherwise. The political dimensions to judicial appointments vary, of course, from jurisdiction to jurisdiction, and even from period to period in any particular jurisdiction.¹ This last point is reflected in several of the contributions to this book. The Constitutional Reform Act 2005 has reshaped the politics of judicial appointments in England and Wales, by creating a new process for making appointments organised around the

1 See generally P.H. Russell, 'Conclusion' in K. Maleson and P.H. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 420 at 420.

Judicial Appointments Commission, with the Lord Chancellor's discretion now significantly curtailed. In this chapter, the point of departure is that the politics of judicial appointments will tend to vary between jurisdictions, even those with a shared constitutional heritage, such as England and Wales on the one hand and Canada on the other.

I want, in particular, to focus on judicial appointments in Canada. For as we shall see, what is especially notable about Canada are the varied ways in which judicial appointments could be said to have a distinctly political dimension. On the one hand, it is perhaps unsurprising that judicial appointments have a strong political dimension in Canada. After all, because of the federal character of the Canadian constitution, with the division of legislative power between federal and provincial institutions policed by the courts, judges in Canada have long been more directly involved in political disputes than their English and Welsh counterparts.² On the other hand, it is the multi-faceted nature of the politics of judicial appointments in Canada that is so remarkable. For a start, despite the expansion of judicial review following the introduction of the Charter of Rights and Freedoms in 1982, which empowers the courts to strike down federal and provincial legislation that violates certain enshrined rights, federal judicial appointments remain a matter for almost untrammelled political discretion. As we shall see, this is problematic because of the evidence that partisan considerations have at times influenced the selection of federal judges. But, even beyond this, politics are part of judicial appointments in Canada in additional ways, including regional representation, group representation and ideological representation.³ In surveying the politics of judicial appointments in Canada, one objective of this chapter is to remind us of the wisdom of moving

2 See generally F. Vaughan, 'Judicial Politics in Canada: Patterns and Trends' in P. Howe and P.H. Russell (eds) *Judicial Power and Canadian Democracy* (Montreal: McGill-Queens University Press, 2001) 3.

3 F. L. Morton (ed) *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 2002, 3rd edn) 124-126.

away from a system of largely untrammelled political discretion to one organised around an independent appointments commission. For bluntly put, the politics of judicial appointments in Canada are a reminder why, in an age of ascendant judicial power, several constitutional democracies have turned to judicial appointment commissions in search of a process that blends independence, accountability and an awareness of the need for greater judicial diversity.

Appointing Judges in Canada

Broadly speaking, there are three levels of courts in Canada. There are two levels in each province or territory: superior or upper-level courts known as 'section 96 courts' and lower-level courts known as 'section 92 courts.' There are also superior courts with a federal jurisdiction: the Supreme Court of Canada; the Federal Court of Appeal; the Federal Court and the Tax Court of Canada. Under the Constitution Act 1867, the authority to make appointments to the different levels of courts is divided between federal and provincial governments. The Federal Government has exclusive authority to appoint judges in federal courts. Unusually for a federation, the Federal Government also has exclusive authority for appointments to section 96 courts. While section 96 courts are presided over by federally appointed judges, they are funded and administered by the provincial governments, and serve as the first court of appeal for cases originating in section 92 courts in a variety of civil, criminal and family law matters. Provincial governments alone are authorised to make appointments to section 92 courts. In all, there are in excess of 2,500 judges in Canada, 1,000 of whom are federally appointed, with the rest appointed by the provincial governments to section 92 courts. While provincial governments are thus responsible for appointing more than half of all judges in Canada, the Federal Government's power of appointment reaches very deep into the provinces' judicial systems by virtue of its power to appoint all of the judges in section 96 courts. Or more pointedly put, most of

the important civil and criminal trials, and virtually all appellate cases in provincial as well as federal courts, are presided over by federally appointed judges.

While the Constitution Act is clear in allocating authority for judicial appointments between the different levels of government, it stipulates little about the content of the appointment processes. Rather, the Constitution Act treats judicial appointments as a matter for governmental discretion. All that said, it is possible to distinguish between three general categories of appointment processes in Canada. First, the process used for all federal appointments except those to the Supreme Court; the Federal Court of Appeal, the Federal Court, the Tax Court and the section 96 courts. Second, the process used for appointing the nine Justices of the Supreme Court. Third, the processes used by provincial governments for appointments to section 92 courts. My focus in this chapter is on federal appointment processes. One reason above all explains this focus: patronage has been most obvious (and persistent) in federal, not provincial, appointments. A dominant motif of federal appointments is a reluctance to restrict ministerial discretion that has led, in turn, to the failure to address the problem of patronage. For at various points over the last 30 years or so, the ease with which federal ministers could reward supporters with appointments to judicial office has catapulted judicial appointments to the forefront of electoral politics and federal politics in ways that might surprise, and very possibly unnerve, the British observer. To be clear, a person's involvement in party politics should not disqualify them from the bench; the fact that a person has been politically active or a supporter of or donor to a political party does not mean that there are not otherwise qualified for judicial office.⁴ But neither should political relationships be a relevant criterion for appointment. As we shall see, what this all means is that because a federal minister has considerable discretion

4 L Sossin 'Judicial Appointment, Democratic Aspiration and the Culture of Accountability' (2008) *University of New Brunswick Law Journal* 11 35.

when making appointments, and because of the considerable reach of the Federal Government's appointment power, and finally because the Liberal Party has been in power at the federal level for 55 of the last 75 years, it is the Liberal Party that has substantially shaped the composition, and hence the character, of the Canadian judiciary and, by extension, the proper role of and limits on the courts in the post-Charter era.

Federal Judicial Appointments

The Constitution Act authorises the Cabinet to make federal judicial appointments. In practice, however, most appointments are made on the advice of the Minister of Justice and the Prime Minister (albeit usually after some consultation with other ministers, and especially ministers in the provincial governments). For the British observer, comparisons with the traditional 'British' model of judicial appointments are obvious, with the Minister of Justice exercising discretionary powers similar to those enjoyed by the Lord Chancellor prior to the 2005 reforms. Comparisons of this sort are unsurprising. At the time of its founding in 1867, most of Canada's founders sought to emulate many of the practices of the British constitution. However, these comparisons should not be overstated. For a start, the Minister of Justice in Canada typically makes more appointments than the Lord Chancellor ever did, and for much of the 20th century did so without the specialist and knowledgeable support embedded in the Lord Chancellor's Department. Indeed, it was only in 1973 that a Special Advisor on Judicial Affairs was created to assist the Minister of Justice in collating names and background information on possible judicial candidates. This practice of collecting information on possible candidates was especially significant since whereas the Lord Chancellor traditionally identified candidates from a small number of 'silks' found at the upper echelons of the Bar, there is no equivalent tightly knit, readily identifiable pool of distinguished lawyers in Canada upon which the Minister of Justice can draw. What is more, unlike

the Lord Chancellor, there has never been a requirement that the Minister of Justice is ‘an esteemed lawyer’. Most Ministers of Justices would be more aptly described as politicians with only limited experience of the law. Perhaps most significantly, the Lord Chancellor was widely regarded—by the mid 20th century at least—as having eschewed partisan considerations when making judicial appointments. The same could not be said of the Canadian Minister of Justice who was commonly said to use judicial appointments to reward supporters of the Federal Government, and to some extent is said still to do so.

By the 1980s, there was substantial evidence that successive federal governments had rewarded supporters and former government members with appointments to judicial office. According to an influential report prepared by the Canadian Bar Association in 1985, partisan considerations had exerted a controlling influence in appointments to section 96 courts in Saskatchewan and the Atlantic provinces, were significant in appointments made in Alberta and Manitoba, but less of a factor in Ontario and Québec. The report further suggested that party political considerations were also a dominant factor for appointments to federal courts, with many appointees described as active supporters of the ruling Liberal Party.⁵ Disquiet with political patronage peaked under the Liberal Government headed by Prime Minister Pierre Trudeau. At the provincial level, a newly elected Progressive Conservative government in Saskatchewan had clashed in 1982 with the Trudeau government over the latter’s appointments to section 96 courts. According to the Saskatchewan Government, the Federal Government had packed the Saskatchewan Court of Appeal with Liberal partisans (former party leaders, defeated candidates, party workers etc). Retaliating, the Progressive Conservative government reduced the number of judicial positions on the Saskatchewan Court

5 Canadian Bar Association, *The Appointment of Judges in Canada* (Toronto: CBA, 1985) at 37-40 and 57. See also the paper by the author of the CBA’s report: E.N. McKelvey, ‘Appointment of Section 96 Judges’ (2008) 58 *University of New Brunswick Law Journal* 5.

of Appeal from seven to five, thereby limiting opportunities for Liberal patronage. At the national level, political patronage was an issue in the 1984 general election contested by Prime Minister John Turner of the Liberal Party and Brian Mulroney of the Progressive Conservative Party. Before his resignation as leader of the Liberal Party and Prime Minister, and before Turner's elevation to the office of Prime Minister, Trudeau had appointed three former cabinet ministers to federal courts and several others leading Liberal politicians to provincial courts. In his election campaign, Mulroney exploited the furore over these partisan appointments by promising to change the culture of political patronage in Canada.⁶

Four years later, in 1988, the Mulroney government instituted a new system of advisory committees to provide objective advice on the suitability of candidates for judicial office.⁷ There is at least one committee in each province and territory, (but, because of their population, Ontario has three regional-based committees, and Québec has two). Each advisory committee has eight members, comprising one nominee each from: the provincial or territorial law society; the provincial or territorial branch of the Canadian Bar Association; the Chief Justice or another senior judge of the province or territory; the provincial Attorney General or territorial Minister of Justice; the federal Minister of Justice; and the law enforcement community. There are also three nominees of the federal Minister of Justice representing the general public.

Advisory committees are screening, not nominating, committees. Their function is not to search out and compile a

6 A study of judicial appointments in Mulroney's first term (1984-1988), which pre-dated the system of advisory committees, suggested that patronage continued to have a major influence on appointments: P.H. Russell and J. Ziegel, 'Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees' (1991) 41 *University of Toronto Law Journal* 4.

7 See generally A.S. Millar, 'The New Federal Judicial Appointments Process: The First Ten Years' (2000) 39 *Alberta Law Review* 616.

short-list of candidates. Their function is instead to assess the qualifications of applicants who meet the minimum requirements for a federal judicial appointment laid down in the Judges Act — namely, ten years of membership at a provincial bar before appointment, which in turn requires both a law degree and the successful completion of the provincial bar examination. The Commissioner for Federal Judicial Affairs (CFJA) passes the name of applicants who meet this very low threshold to the advisory committee based in the judicial district of an applicant's practice or occupation. The CFJA is an employee of the Federal Government, with the status of a deputy minister. The advisory committees then assess the applicants submitted to them by the CFJA. In assessing candidates, the committees are encouraged to respect diversity, giving appropriate weight to less conventional forms of legal experience. The committees are not able to rank applicants. Rather, they must decide whether to 'recommend' an applicant to the Minister of Justice. Or, failing that, the committees must inform the minister that they are 'unable to recommend' a given applicant. When determining whether to recommend an applicant, advisory committees are not required to hold interviews, although they are encouraged to do so if opinions are divided. Once the advisory committee has completed its assessment, the application is passed to the Minister of Justice. Nothing prevents the minister from appointing someone who has not been recommended by an advisory committee. However, in practice, successive ministers have undertaken not to appoint to the bench individuals who have not previously been recommended.

This system of advisory committees preserves a substantial zone of discretion for the Minister of Justice—but does it address the problem of political patronage? Most studies conclude that the advisory committees have not weeded out partisan considerations. Rather, they suggest that partisan considerations continue to have a major influence on judicial appointments.⁸ This

8 See e.g. T. Riddell, L. Hausegger and M. Hennigar, 'Federal Judicial

is unsurprising. The task for the advisory committees, after all, is not to recruit persons suitable for judicial office, but merely to vet applications submitted to them by the CFJA, who, in the final analysis, is an employee of the Federal Government. There has long been concern among academics and lawyers that the system of advisory committees does not diminish or curtail patronage, but ‘aids and abets’ it by supplying the Minister of Justice with cover to take partisan considerations into account.⁹ These concerns have been heightened by recent reforms introduced by the Conservative Federal Government under Prime Minister Stephen Harper.

In 2007, the Harper government reduced the range of options open to advisory committees. Previously, the committees were able to advise whether an applicant was ‘recommended’, ‘highly recommended’ or someone whom they were ‘unable to recommend’. The ‘highly recommended’ classification has been removed. This has been interpreted as emasculating the advisory committees inasmuch as they are no longer able to differentiate between candidates who meet a minimum threshold of suitability for judicial office, and therefore enlarging ministerial discretion. The minister no longer has to contend with the embarrassment that could perhaps ensue from choosing a candidate who the committee deemed only ‘recommended’ rather than ‘highly recommended’. In addition, the requirement for the advisory committee to include nominees representing law enforcement was introduced in 2007. This too has been read as shifting the balance in favour of the Minister of Justice, inasmuch as the law enforcement nominee might be inclined to favour candidates who share the minister’s approach to politically sensitive issues such as sentencing. Finally, the Harper government named the judicial representatives as the *ex officio* chairs of their respective advisory committees, with their right to vote on applications

Appointments: A Look at Patronage in Federal Appointments since 1988’ (2008) 58 *University of Toronto Law Journal* 39.

9 ‘F.C. DeCoste, ‘Political Corruption, Judicial Selection and the Rule of Law’ (2000) 38 *Alberta Law Review* 54 at 675.

removed except where necessary to break a tie. This can also be read as shifting the balance of power within the committees away from the lawyers towards the non-lawyers.

The combined effect of Harper's reforms is, then, to shift the balance on advisory committees towards the Minister of Justice. It is therefore unsurprising that the reforms have been strongly criticised by elements of Canada's legal community, including the Chief Justice of the Supreme Court of Canada, Beverley McLachlin; former Chief Justice, Antonio Lamer; the Canadian Judicial Council and the Canadian Bar Association. Arguably, though, what lurks beneath opposition to Harper's reforms is an apprehension that the Conservatives are looking to subvert the Charter and reverse nearly three decades of progressive precedents from the Canadian judiciary. Critics fear that by stacking advisory committees with those inclined to share similar outlooks as the minister, the Conservatives will succeed in packing the courts with social conservatives.¹⁰ It might be that, in the longer term, one possible effect of Harper's reforms will be to stimulate greater interest among Liberal Party politicians in fully-fledged nominating committees.

Appointments to the Supreme Court of Canada

The Supreme Court of Canada is comprised nine justices, who sit *en banc*. The nine justices are appointed by the Cabinet. By convention, the Cabinet acts on the recommendation of the Prime Minister, who in turn relies on the Minister of Justice to consult with representatives from the legal community. Traditionally, there have been no advisory committees, no formal consultations in this process and no public scrutiny. In this, the Supreme Court presents a curious contrast. At the same time as the Charter has transformed the Court's role as the guardian of rights, policing constitutional limitations on the legislature, its appointment process remained, until very

10 R. Knopff, 'The Politics of Reforming Judicial Appointments' (2008) 58 *University of New Brunswick Law Journal* 44,47.

recently, unchanged. As one commentator has put it: “At the risk of simplification, Canada now has an American-style Supreme Court with an unreformed British-style appointments system.”¹¹ In the last five years, however, this seems to have been changing, with both the Liberals and the Conservatives innovating when making appointments to the Court. To be clear, the trigger for this change is not patronage; most accept that appointments to the Court have been immune from partisan considerations for at least the last 60 years or so. Rather, the trigger is the marked increase of the judiciary’s power vis-à-vis the legislature since the enactment of the Charter in 1982.

In 2005, the Liberal Minister of Justice, Irwin Cotler, appeared before a Standing Parliamentary Committee to discuss the two nominees that the Cabinet proposed to appoint.¹² For the first time in Canadian history, a Minister of Justice discussed the qualifications of proposed nominees to the Supreme Court with Parliament. The nominees, Justices Charron and Abella, did not themselves appear before the committee. Nor did the committee have any power to block the appointment. However, it was an important indication of an increasing awareness of the need to involve Parliament in appointments to Canada’s highest court. In 2005, a further vacancy in the nine-person court arose. The Minister of Justice announced that a new four-stage process would be used to fill the vacancy left by Justice Major’s retirement. First, the Minister of Justice would prepare a shortlist of five to eight names. Second, this shortlist would then be submitted to an advisory committee composed of MPs from each main party, a nominee of the provincial Attorney Generals, a nominee of the provincial law societies and two distinguished non-lawyers. This advisory committee would then trim the shortlist. Third, the

11 F.L. Morton, ‘Judicial Appointments in Post-Charter Canada: A System in Transition’ in K. Malleson and P.H. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 56 at 57.

12 For Irwin Cotler’s account of these and other events, see I. Cotler, ‘The Supreme Court Appointment Process: Chronology, Context and Reform’ (2008) 58 *University of North Brunswick Law Journal* 131.

choice of which candidate to appoint from the whittled down shortlist remained with the Minister of Justice. Fourth, once the Government had announced the appointee, the Minister of Justice would appear before a parliamentary committee to discuss the qualifications of the appointee. The parliamentary committee would have no power to block the appointment.

Before this process could be completed, a general election was held in which the Liberals were defeated. It is worthwhile pausing at this point to note that judicial appointments surfaced as an electoral issue once more. Paul Martin's Liberal Party depicted Stephen Harper's Conservatives as a threat to the Charter inasmuch as the appointment of Conservative judges would undermine the rights protection regime that had developed in large part because of the Supreme Court's ruling since the Charter's inception in 1982. Despite this, the Conservatives won the most seats in the 2006 election, and formed a minority government. A pressing matter for the incoming Conservative government was to fill the vacancy on the Supreme Court. Instead of starting the process anew, the Conservative government continued with the process envisaged by the Liberals. However, the Conservative government added a fifth stage: the appointee would appear before an ad hoc committee of parliamentarians to answer questions. This committee would not have any power to block the appointment, but would have the opportunity to voice its assessment of the appointee.

In February 2006, Marshall Rothstein, a judge of the Federal Court of Appeal, appeared before a committee of parliamentarians chaired by an academic lawyer, Peter Hogg. The hearing lasted for around three and a half hours, with Justice Rothstein answering 60 or so questions. On most accounts, the questioning was respectful. At the end of the meeting, the Minister of Justice invited the members of the committee to communicate their views on Justice Rothstein directly to the Prime Minister. As Peter Hogg himself has put it: "the nominee's credentials, his statement to the committee, and his answers to questions left no doubt as to his suitability for appointment, and the reaction

of the committee members left no doubt that they would advise the Prime Minister to proceed with appointment.”¹³ A few days later, the Conservative government appointed Justice Rothstein, the same candidate that the Liberal government had also intended to appoint, to the Supreme Court to fill the vacancy left by Justice Major.

Different people will have different views on non-binding parliamentary hearings for appointments to the Supreme Court such as that used in the appointment of Justice Rothstein. It seems likely, however, that some sort of hearings will be used for future appointments to the Supreme Court. Indeed, in 2008, the Conservative government again proposed a hearing to fill the vacancy left by the retirement of Justice Bastarache. However, a general election intervened and Stephen Harper, appointed Justice Cromwell without a hearing, but after consulting the Leader of the Opposition. British observers will be aware of a slowly emerging debate about whether appointments to the UK Supreme Court should be subject to some form of parliamentary scrutiny. Those who are opposed to such a measure, and it seems that this remains the majority view, may be interested to reflected on the initiatives of the Liberal Minister of Justice, Irwin Cotler, that fell short of hearings; that is to say, a ministerial appearance before a parliamentary committee in order to discuss the qualifications of the proposed appointee to the country’s highest court. Back in the Canadian context, one obstacle to greater use of parliamentary hearings is the politics of federalism. There has long been pressure for enhanced, formalised provincial input in appointments to the Supreme Court. Provincial governments are likely to regard parliamentary input in the appointment process as a means for the Federal Government to influence the type of justices appointed to the court, and render it more likely that the type of justices appointed to the Court are centralisers who are keen to use the Charter to enforce minimum, universalist standards on the provincial governments.

13 P.W. Hogg, ‘Appointment of Justice Marhsall Rothtein to the Supreme Court of Canada’ (2006) 44 *Osgoode Hall Law Journal* 527 at 530.

The politics of federalism is further reflected in the composition of the Supreme Court. Section 6 of the Supreme Court Act requires that at least three of the Justices of the Supreme Court hail from Québec. This requirement is, of course, justified by the Supreme Court's appellate jurisdiction over Québec's civil law system. However, more than this, the guarantee that a third of the judges in Canada's highest court come from Québec is also an important symbolic recognition of the special status of Québec and French Canadians in political life of the country. This status is further reflected in the convention that the Chief Justice of the Supreme Court alternates between an anglophone and a francophone. In addition to the formal, legal requirement that three justices must hail from Québec, there is also a strong convention of regional representation that ensures that the Court includes one judge from British Columbia, one judge (ideally on a rotating basis) from Alberta, Saskatchewan or Manitoba and, finally, one judge from one of the four Atlantic provinces. It is interesting to note that regionalism as a consideration shaping the appointment of the top federal judges has waned in the United States over the last 150 years or so, yet remains so strong in Canada. The convention of regional representation is, it seems, critical to securing the legitimacy of Canada's top court.

Just as diversity of regions must be represented on the Supreme Court, so there is concern about diversity more broadly conceived. A convention of representation of women has also developed. In 1982, Prime Minister Trudeau appointed Bertha Wilson as the first woman to sit on the Supreme Court. In the 1980s, Prime Minister Mulroney appointed two further women to the Court: Claire l'Heureux-Dubé and Beverley McLachlin, the latter becoming Chief Justice in 2000. By the mid-1990s, a convention had developed of having at least three women justices on the Supreme Court. Today, four women justices sit on the Supreme Court: Chief Justice Beverley McLachlin, Justice Marie Deschamps, Justice Rosalie Abella and Justice Louise Charron. This reflects advances in the representation of women in federal judicial appointments: whereas in 1980, three per

cent of federally appointed judges were women, by 2003 this had increased to 26 per cent.¹⁴ It is important to note that while Canada has made significant steps to securing a judiciary that better reflects society in gender terms, this has not happened overnight. Rather, it has taken over 20 years of concerted leadership by politicians, judges, lawyers, professional associations and academics. The progress that has been made in securing greater numbers of women judges has also built on the wider 'feminisation' of the legal profession, where 'females now outnumber males in law schools, lawyers called to the Bar, and lawyers under the age of 30'.¹⁵ The ethnic diversity that exists in Canadian society has also been reflected on the top court, with the appointment of Ukrainian-Canadians (John Sopinka) and Italian-Canadians (Frank Iacobucci). Increasingly, there have also been calls for the Supreme Court to have permanent representation from Canada's aboriginal community, in order that the Supreme Court have expertise not only in the English common law and French civil law, but also aboriginal law.

Conclusion

One strong theme to emerge is that judicial appointments in Canada, whether to the Supreme Court or other levels of the judiciary, are subject to political debate. Debate is not confined to lawyers or academics. It is in the mainstream of political life, even featuring in the charged atmosphere of election campaigns. Important though they are, debates over the advisory committee system, whether Parliament should have a greater say in appointments to the Supreme Court and whether the Supreme Court is sufficiently reflective of Canadian society, conceal a much larger debate that is yet to be taken seriously in Canada. This is a debate about whether there exists sufficient

14 C. Thomas, *Judicial Diversity in the United Kingdom and other Jurisdictions: A Review of Research, Policies and Practices* (London: The Commission for Judicial Appointments, 2005) 84.

15 D. Brusegard, *The Implications of Demographic Change in the Legal Profession* (Canadian Bar Association, 2004) 3.

political diversity within the Canadian judiciary. Inevitably, most discussions of judicial appointments focus on the risk of politicians taking political considerations into account when making appointments to the bench. This risk is a real one, as the history of patronage in Canada demonstrates with a vividness that might surprise British observers.

But there is another subtler risk, and one much less commented on. It is the risk that comes from judges with too great a homogeneity of outlook; the risk of too comfortable a consensus about issues, such as the proper role of and limits on courts or the proper interpretative approach to an entrenched bill of rights such as the Charter. Differently put: there is always a risk of ‘producing an insulated self-selecting lawyerly caste with too little heterogeneity of outlook, especially as regards the sort of important social policy issues at the heart of rights adjudication.’¹⁶ This risk is particularly pertinent in Canada given the electoral hegemony of the Liberal Party for much of the 20th century. As they have enjoyed electoral success, so the Liberal Party has enjoyed exercising the discretion to make judicial appointments. There is an important sense in which the “Liberal Party orthodoxy as a result became the political orthodoxy of the legal community”.¹⁷ For not only has the Liberal Party appointed most of the Canadian judges, but practising and academic lawyers have learnt and plied their trade under the laws and policies of successive Liberal governments. For a multicultural country like Canada that continues to take steps to reflect the diversity of its people on the bench, the challenge is perhaps to pursue a true diversity of judicial politics in its highest courts.

16 J. Allan ‘Judicial Appointments in New Zealand: If it were one when ‘tis done, then ‘twere well it were one openly and directly’ in K. Maleson and P.H. Russell (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006) 420 at 420.

17 F.C. DeCoste ‘Howling at Harper’ (2008) *New Brunswick Law Journal* 121 at 129.

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JUDICIAL APPOINTMENTS

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