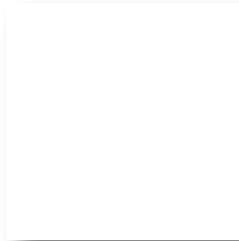
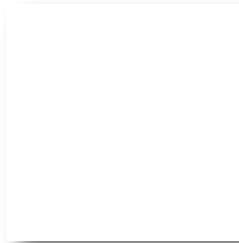


# Guarding the guardians?

towards an independent, accountable  
and diverse senior judiciary

**Professor Alan Paterson OBE  
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## ■ Executive summary

At the heart of what Vernon Bogdanor has described as the ‘The New British Constitution’ has been the rise in the political significance of the judiciary. The explosion in judicial review of government decisions, the incorporation of the European Convention on Human Rights into domestic law and the move to a new Supreme Court have all contributed to an extended process of increasing judicial power vis-a-vis the other limbs of state.

This emergence of a more powerful judicial branch of government has been essential in providing a restraint on executive power and in the admirable protection of individual and minority rights. However, it also raises significant issues. At the core of Britain’s unwritten constitution lies the concept of legitimacy as an underpinning for the rule of law. It is a basic premise in a mature democracy that those wielding power in the political sphere must – if this power is to be fully legitimate – also be in some way accountable to and representative of those from whom that power is derived and on whose behalf it is held.

This raises a pressing question in relation to the necessarily unelected judicial branch of government: ‘who guards the guardians?’ Or perhaps more accurately, *how* can one ‘guard the guardians’ without undermining the central principle of judicial independence? It also raises the important interconnected question of how the composition of the judiciary – in terms of its relationship to the diverse make-up of the society it serves – impacts on this concept of legitimacy.

These are in no way purely legal or technical issues but ones concerning the fundamental distribution and exercise of power in our democracy in which we all have a stake. The crux to resolving them lies in establishing a constitutionally appropriate system by which judges – and particularly the senior judges – are appointed.

This paper will argue that the current system for senior judicial appointments is not fit for purpose. It will argue that an appropriate process requires a rebalancing between three guiding constitutional principles for judicial appointments: *independence*, *accountability* and *diversity*. Establishing such a process will enhance not only the democratic legitimacy of the system as a whole but also – importantly – the authority of the judges themselves and the crucial role they perform.

Specifically:

- The paper examines the factors contributing to the expanded constitutional role of the judiciary. It argues that, while of real societal value, the process has led to an increasingly porous boundary between legal and political decision-making and this should not be ignored. Instead, the enhanced judicial role should be placed on a more solid footing, buttressed by a constitutionally appropriate system of senior judicial appointments.
- The paper then examines the current appointments process. It argues that the dominant extent to which the senior judiciary are involved in the appointment of the senior judiciary is inappropriate. It is of no disrespect to the eminent and high calibre individuals involved to recognise that, in a democracy, no branch of government should be potentially self-perpetuating. Democratic legitimacy requires a degree of involvement of elected officials in the appointment of those adjudicating on the laws passed by elected officials.
- The significant diversity deficit in the senior judiciary is then examined. The paper argues that diversity in senior judicial appointments is not simply a desirable goal, but a fundamental constitutional principle. At the very heart of the legitimacy of an independent judiciary are its claims to be able to deliver 'fairness'. A senior judiciary whose composition reflects an apparent lack of fairness runs the real risk of undermining its own authority.
- Diversity also impacts directly on the substantive delivery of justice. Judicial decisions are unavoidably influenced by judicial background and perspective, particularly in relation to the arguable points of law before the highest courts. The law of the land constitutes the collective moral code of society. A key aspect of the competence of the Supreme Court, as a collective decision-making body, is that it should

be imbued with (and be able to relate to) the broad array of perspectives and experiences that contribute to that society. The institutional competence or 'merit' of such a court is significantly weakened if this is not the case.

- The paper looks to draw lessons on senior judicial appointments from an international perspective by identifying mechanisms that have been introduced in other jurisdictions to enhance judicial accountability (while preserving judicial independence) and improve judicial diversity. In particular, it argues that the debate must move on from the reductive tendency to look only as far as the Senate confirmation hearing in the USA.
- The paper outlines proposals to address the democratic deficit in senior judicial appointments. It recommends a move away from the present system of ad hoc appointing commissions with a predominating judicial influence towards a more enduring, expanded senior judicial appointments commission, with a balanced input from the senior judiciary, cross-party parliamentarians and lay members. This would be designed to enhance legitimacy without allowing any group a disproportionate sway. It will also argue that an appropriately designed system of post-appointment parliamentary hearings should be introduced for newly appointed Supreme Court Justices (drawing on the process used in Canada). The purpose of these hearings would not be to alter or impact on the nomination but to facilitate a dialogue between parliament and the senior judiciary and allow the British public the opportunity to learn about those holding real power in their society.
- The paper then outlines proposals to address the diversity deficit in senior judicial appointments. In particular, it calls for a reconsideration of the approach to the concept of 'merit' in relation to appointments to the highest courts. It argues that the prevailing emphasis on (and exaltation of) one relentlessly individualised understanding of merit is inappropriate for appointments to the Supreme Court (as it would be for any collective court or body). Instead, the collective competence of the Court should play a central role in appointments to it, allowing for the correction of any corporate deficiencies such as the absence of particular legal specialisms or an imbalance in the membership of the court in terms of diversity of experience. With this, a candidate will – importantly – only be appointed if they are

the *best* candidate. They will be the best candidate because they best reflect what would be most beneficial to the Court and, as a result, the society it serves.

## ■ Introduction

*“Who our judges are, and how they are selected, is a public matter and fully justifies public interest and debate.”<sup>1</sup>*

**Tom Legg**

former Permanent Secretary of the  
Lord Chancellor’s Department

*“In a democracy with an uncodified constitution, there is much that depends not on law, but on a broader concept of legitimacy.”<sup>2</sup>*

**Jonathan Sumption**

Supreme Court Justice

### Guarding the guardians?

With the 2009 move across Parliament Square to the newly created Supreme Court and the resulting structural separation of the senior judiciary from the legislature, the judiciary decisively assumed its position as the third branch of government in the United Kingdom. This move marked a further step in an extended constitutional process of increasing judicial power vis-a-vis the other limbs of state, described by one commentator as “a shift from democracy to ‘juristocracy’”.<sup>3</sup> As the new Supreme Court Justice Jonathan Sumption indicates:

*“One of the most significant constitutional changes to occur in Britain since the Second World War has been*

1 T Legg, ‘Judges for the New Century’, Public Law, Spring 3, 2001

2 J Sumption Q.C., ‘Judicial and political decision-making the Uncertain Boundary’, F.A. Mann Lecture, 2011

3 H Genn, ‘The Hamlyn Lectures 2008: Judging Civil Justice’, Cambridge University Press 2010

the rise in the political significance of the judiciary”<sup>4</sup>.

This emergence of an empowered judiciary has been vital in providing a necessary restraint on executive power and in protecting individual and minority rights. However, perhaps inevitably, it has increasingly moved the judiciary – particularly the senior judiciary on which this paper will focus – more squarely into the political (‘with a small p’) arena.<sup>5</sup> As one leading writer in the field outlines:

“The emergence of the judiciary as the third branch of government, checking and scrutinising the executive, has removed the gap between the functions of the senior judiciary and elected politicians. *Judges are not politicians in wigs but they are increasingly required to reach decisions in relation to politically controversial issues which cannot be resolved without reference to policy questions.*”<sup>6</sup> [emphasis added]

With this comes a conundrum. The new constitutional settlement requires an independent and robust judiciary to provide an appropriate restraint on government power. However, it is a basic premise in a mature democracy that those wielding power in the public sphere must – if this exercise of power is to be fully legitimate – also be in some sense accountable to those from whom that power is derived and on whose behalf it is held.

As Sumption identifies above, this concept of legitimacy lies at the core of Britain’s unwritten constitution and this is nowhere more acutely relevant than in relation to the necessarily unelected judicial branch. It gives rise, therefore, to a pressing question: ‘who guards the guardians?’ Or perhaps more accurately, *how* can one ‘guard the guardians’ without undermining the central principle of judicial independence? It also raises the important interconnected question of how the composition of the judiciary – in terms of its relationship to the diverse make-up of the society it serves – impacts on this concept of legitimacy (particularly in the context of the expanded judicial role).

These are in no way technical or theoretical issues relevant only

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4 J Sumption Q.C, ‘Judicial and political decision-making the Uncertain Boundary’, F.A. Mann Lecture, 2011

5 The principal OED definition of ‘political’ is “of or concerning the state or its government”.

6 K Maleson, ‘Rethinking the Merit Principle in Judicial Selection’, *Journal of Law and Society*, Vol. 33, No. 1 March 2006

to the practitioners involved but ones concerning the fundamental distribution and exercise of power in our democracy in which we all have a stake. The crux to resolving them lies in establishing a constitutionally appropriate system by which judges – and particularly the senior judges – are appointed. It is for this reason that, as High Court judge and former Solicitor General Sir Ross Cranston emphasises, “judicial appointments are too important to be left to the judges”<sup>7</sup>.

### Constitutional ‘touchstones’ for judicial appointments

The argument that follows is predicated on the idea that there are three key constitutional principles or ‘touchstones’ that are relevant to and must in some way be balanced in relation to an appropriate system of senior judicial appointments: independence, accountability and diversity.

#### *Independence*

As the recent Ministry of Justice consultation paper recognises, “the rule of law is the basic foundation of our democracy”.<sup>8</sup> At the heart of this concept is an *independent* judiciary able to ensure that the law is enforced equitably and equally against all - including the politicians who enact that law – and therefore protect basic rights and freedoms. This requires the judiciary to be free (and to be *seen to be free*) from undue political influence in its decision making and also in the means by which it is appointed. It is for this reason that judicial posts are rightly protected in terms of security of tenure, putting the position and conduct of individual judges essentially out of reach of the other branches of government. It is also this concept that lay heavily behind the push for a purer separation of powers and the removal of executive control of judicial appointments under the Constitutional Reform Act 2005 (“CRA 2005”). Indeed, for some, it leads to the conclusion that the system of judicial appointments “should be wholly independent of external influence”.<sup>9</sup>

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7 Sir Ross Cranston, ‘Foreword’, in, Alexander Horne, ‘The Changing Constitution: A Case for Judicial Confirmation Hearings?’, Study of Parliament Group, London 2010

8 MOJ consultation paper, ‘Appointments and Diversity: A Judiciary for the 21st Century’, 2011

9 Lord Kerr, evidence before the Constitution Committee of the House of Lords, Autumn 2011. All quotations from evidence before the Constitution Committee are taken from the respective uncorrected oral transcript.

### Accountability

However, while vital, judicial independence cannot be an absolute in a democratic society. The defining concept of the rule of law itself is predicated directly on the consent and compliance of the governed and this in turn rests heavily on the *legitimacy* (and perceived legitimacy) of the institutions upholding the law. To turn this around, it is the legitimacy of the judiciary that justifies and supports their authority (and with it, their independence). Thus, as Lord Justice Etherton suggests:

“Of course the separation of powers is an important underlying factor in the appointment and operation of the judges, but that principle cannot be an absolute one in relation to the appointment of judges because the judges cannot be purely a self-appointing body.”<sup>10</sup>

In a democracy, the legitimate exercise of power requires corresponding mechanisms of *accountability*:

“a mature democracy requires those who exercise significant public power to hold themselves open to account. Judicial power ought not to be excluded from accountability requirements. *The challenge is to develop mechanisms of accountability that do not undermine judicial independence.*”<sup>11</sup> [emphasis added]

The need for sitting judges to be free from undue influence requires that any such mechanisms must operate at the appointments stage. As such, any desire to ensure that judicial appointments are ‘wholly independent of external influence’ is flawed: there is an important constitutional need to link in some way the (increased) power of the judiciary to those on whose behalf it is held. As Professor Thomas indicates, along with judicial independence:

“We also need to consider legitimacy. We are not just talking about constitutional principles—we are really talking about democratic principles. In a constitutional democracy, the legitimacy of unelected individuals—judges—to adjudicate on the laws passed by elected officials requires that elected officials are in some way involved, particularly in the appointments process.”<sup>12</sup>

10 Evidence before the Constitution Committee, Autumn 2011

11 A Le Sueur, ‘Developing mechanisms for judicial accountability in the UK’, *Legal Studies*, Volume 24, Issue 1-2, 2004

12 Evidence before the Constitution Committee, Autumn 2011

## Diversity

The democratic legitimacy of a branch of government is also directly linked to the extent to which it represents the society it serves. The increasing recognition of this fact has led to initiatives such as all-female shortlists for party candidates to become an MP. However, the concept of institutional legitimacy through reflective representativeness is particularly relevant to the judicial branch precisely because it is clearly precluded from the direct form of elected representativeness.

At the very heart of the legitimacy of an independent judiciary are its claims to be able to deliver ‘fairness’. A judiciary exercising significant power in a democracy whose own composition reflects an apparent lack of fairness runs the serious risk of undermining its own authority (again illustrating the interconnectedness of these key ‘touchstones’ for judicial appointments).

Furthermore, the law of the land effectively constitutes the *collective* moral code of society. From the perspective of the substantive decision-making of the courts themselves, it is therefore fundamental that those applying this law should be drawn from a cross spectrum of that society and thus carry with them (and be able to relate to) the broad array of perspectives and experiences that contribute to it.<sup>13</sup> In this sense:

“Diversity in the judiciary is not simply a desirable policy stance...It is an element of the delivery of justice that is increasingly vital for the judiciary’s legitimacy in a diverse society. Unlike virtually any other profession, a judiciary that operates in a diverse society must itself be diverse in order to fulfil its very function - the delivery of justice.”<sup>14</sup>

## Striking the balance in senior judicial appointments

The challenge of identifying an appropriate system of appointing senior judges is by no means unique to the UK. In what has

13 It is important to recognise that it is this – the diversity of views born of different life experience – that ‘diversity’ in judicial appointments should be taken as referring to. Gender and ethnicity, as the broadest categories of differing background and of particular significance in terms of perceived legitimacy due to their visible nature, will inevitably take prominence in a paper of this scope. However, the importance of other differing perspectives resulting from, for example, socio-economic status, sexuality and career background are of course also directly relevant.

14 C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions: A review of research, policies, and practices’, The Commission for Judicial Appointments, November 2005

been recognised as a global ‘age of judicial power’, democratic jurisdictions across the world have been engaged in the search for the ‘elusive balance’ between these three guiding concepts.<sup>15</sup>

However, the evidence to the recent House of Lords Constitution Committee review on judicial appointment would suggest that there is a widespread feeling that the balance struck by the CRA 2005 reforms in relation to senior judicial appointments is inappropriate and that change is required.<sup>16</sup> This review has since been overtaken by a Ministry of Justice consultation on the same theme, raising the prospect of a Judicial Reform Bill at some point in the current parliamentary term.<sup>17</sup> Indeed, for the former Lord Chancellor Jack Straw, the current appointments system for the senior judiciary is “unsustainable” as:

“There is plainly a lack of mutual confidence between the senior judiciary and this place [parliament] in respect of the role of the senior judiciary and its broadening authority into areas that are inevitably political.”<sup>18</sup>

As Lord Justice Etherton identifies, the key to resolving these issues “lies in a much more intense focus on the appointments process for th[e] higher courts in order to provide constitutional legitimacy for them within a democratic society”.<sup>19</sup> This paper will attempt to provide just this focus.

In doing so, it is important to stress that what is being analysed and at times criticised is the constitutional *system* as entirely divorced from the high calibre individuals presently involved in that system. The UK is very fortunate to have a generation of progressive and liberal judges on the bench, but it is only necessary to recall Conor Gearty’s alarm at the flood of “dreadful, coercive” public law decisions emerging from the English courts in the 1980s and early 1990s to see that this cannot and should not be factored into the system as a given.<sup>20</sup> The very point of a robust constitutional structure of checks and balances is that it must be capable of

15 K Malleon, “Introduction”, in K Malleon and P Russell (eds.), ‘Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World’, Canadian Public Administration, Volume 51, Issue 1, March 2008

16 [www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/parliament-2010/judicial-appointments-process/consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011](http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/parliament-2010/judicial-appointments-process/consult.justice.gov.uk/digital-communications/judicial-appointments-cp19-2011)

17 Evidence before the Constitution Committee, Autumn 2011. As discussed in Chapter 1, evidence of this lack of confidence can be found in the increased tendency in recent decades for ministers to abandon the convention of not criticising individual judges or judicial decisions.

19 Evidence before the constitution committee, Autumn 2011

20 C Gearty, ‘Can Human Rights Survive?’, The Hamlyn Lectures, Cambridge University Press (2005), p. 2

withstanding less than ideal conditions (and it should therefore be designed with this in mind).

In short, it is an eminently positive thing that today's senior judiciary are required and able to provide just such a check on the executive. However, it is equally important that this power is itself buttressed by a constitutionally appropriate process of senior judicial appointments. Establishing such a process would therefore enhance not only the democratic legitimacy of the system as a whole but also – importantly - the authority of the judges themselves and the crucial role they perform.

## 1 - The expansion of judicial power: the new constitutional settlement

*"The function of the legislature is to make the law...and the function of the judiciary is to interpret and enforce the law. The judiciary is not concerned with policy. It is not for the judiciary to decide what is in the public interest."*<sup>21</sup>

**Lord Greene**

Master of the Rolls, 1944

*"It is an everyday occurrence for courts to consider, together with principled arguments, the balance sheet of policy advantages and disadvantages."*<sup>22</sup>

**Lord Steyn**

2004

At the core of the move towards what Vernon Bogdanor has described as 'The New British Constitution' has been the expansion of judicial power vis-a-vis the other branches of state and the corresponding shift away from the traditional 'balance of powers' towards a purer 'separation of powers' model.

The old orthodoxy was, as outlined by Lord Greene, characterised by a relatively restricted sphere of judicial influence and a correspondingly high degree of deference towards the elected legislature and the executive. However, in the 1960s, the judges "belatedly roused themselves from their...stupor and sought to impose order on a burgeoning regulatory state."<sup>23</sup> Since then, the constitutional process of 'judicialisation' has gathered pace: the accession of the United Kingdom to the European Union, the

21 W Greene, 'Law and Progress', 94 Law Journal 349, 1944

22 Lord Steyn, 'Deference: A Tangled Story', Judicial Studies Board Lecture: Belfast, 25 November 2004

23 D Nicol, 'Law and Politics after the Human Rights Act', Public Law, 4, 2006, pp. 723-4

exponential growth of judicial review of government decisions, the increased administrative role of the judiciary, the sovereignty implications of devolution, the incorporation of the European Convention on Human Rights (“ECHR”) into domestic law and the establishment of the UK Supreme Court have all expanded the judicial remit within the constitutional framework, contributing towards a “quiet but profound revolution”.<sup>24</sup>

Many of these changes have, of course, been consciously mandated by politicians either through legislative acts or a more subtle off-loading of ‘too hot to handle’ topics (such as privacy and ‘right-to-die’ issues). Others – particularly the transformation of judicial review as a remedy – have been primarily judge-led. However, the cumulative impact has been increasingly to draw the judiciary into the realm of governmental (in the broad sense) decision-making, with the effect that “the increase in the ‘small p’ political aspect in judging has been recognised by most fair minded commentators”.<sup>25</sup> As Lord Sumption recently observed:

“it is the experience of most practitioners and many commentators that the uncertain boundary between policy-making and implementation has become more porous....[and] the tendency of the courts to intervene in the making of ‘macro-policy’ has become more pronounced.”<sup>26</sup>

### *The development of judicial review*

Sumption very clearly identifies the key driver behind this rise in the political significance of the judiciary as “the increasingly vigorous exercise of its powers of judicial review.”<sup>27</sup>

In 1974 there were 160 applications for leave to seek judicial review in England and Wales. By 1998 the figure was 4,539 and by 2005 there were upwards of 10,000 judicial review cases a year and climbing.<sup>28</sup> Thus, according to Lord Phillips, “public law

24 V Bogdanor, ‘Parliament and the judiciary: the problem of accountability’, lecture to the UK Public Administration Consortium, February 9 2006. See also generally A Paterson, ‘Judges and the public good: reflections on the last Law Lords’ in A Paterson, ‘Lawyers and the Public Good: Democracy in Action’, Cambridge University Press, 2012

25 A Horne, ‘The Changing Constitution: A Case for Judicial Confirmation Hearings?’, Study of Parliament Group, London 2010. This excellent article has provided an invaluable resource in the writing of this chapter.

26 J Sumption Q.C, ‘Judicial and political decision-making the Uncertain Boundary’, F.A. Mann Lecture, 2011

27 ibid

28 A Horne, ‘The Changing Constitution: A Case for Judicial Confirmation Hearings?’, 2010

now occupies about half of the time of the Supreme Court”.<sup>29</sup> Significantly, these cases frequently involve a direct consideration of the *propriety of a particular policy* undertaken by a governmental body or individual in relation to a variety of broad criteria. It is this that almost inevitably leads to the daily judicial consideration of, as Lord Steyn notes, ‘the balance sheet of policy advantages and disadvantages’. Indeed, for Lord Justice Etherton, the result is that the Supreme Court in particular “is now primarily a policy-making body”.<sup>30</sup>

This exponential growth of the remedy of judicial review has coincided directly with – and must be viewed in the context of – an expansion of executive power, particularly in relation to the legislature. As such, it serves as an important check on the executive and as a safeguard of individual and minority rights. It therefore plays the key role in this context of upholding the rule of law, as identified by Lord Donaldson:

“It is the job of the judges to ensure that the government of the day does not exceed its powers, which is a permanent desire of all governments.”<sup>31</sup>

However, it is clear – and important to recognise – that this explosion in public law, while of real societal value, has empowered the judiciary and shifted the traditional balance between the different arms of state.

### *The incorporation of the ECHR into domestic law*

The incorporation of the ECHR into domestic law under the Human Rights Act (“HRA”) 1998 is another factor that has, as Lady Hale identifies, “clearly increased the social and ‘small p’ political content of the judging task”.<sup>32</sup> The Act effectively extends a form of judicial review to primary legislation, introducing an assessment of the ‘proportionality’ of social policy measures that frequently turns on a judicial consideration of ‘what is necessary in a democratic society’. This unavoidably involves the judges in a difficult balancing act to determine what is in the public interest, which is “an inherently political exercise”.<sup>33</sup>

29 Evidence before the Constitution Committee, Autumn 2011

30 Evidence before the Constitution Committee, Autumn 2011

31 BBC, ‘Obituary: Lord Donaldson of Lynton’ July 2005, [news.bbc.co.uk/1/hi/uk/4204240.stm](http://news.bbc.co.uk/1/hi/uk/4204240.stm) (last accessed on 16 March 2012)

32 B Hale, ‘Equality in the Judiciary: A Tale of Two Continents Tenth Pilgrim Fathers’, Lecture, 2003

33 Sumption, Mann lecture, 2011

Once again, it is important to note the societal value and significance of the Act itself and the protection it provides for both individual and minority rights. This is particularly the case in the context of a powerful executive branch and a contemporary climate which is susceptible to occasional (often very understandable) knee-jerk reactions impacting on individual liberty. Indeed, the HRA has served to give concrete form to the right of an individual to be protected from undue interference with their liberty both from other individuals and, importantly, from the state itself, as advocated by liberal philosophers such as John Stuart Mill and John Locke. This explicit legal protection of fundamental human rights is nothing less than the hallmark of a mature democracy and any attempt to row back from this would be a highly negative step.

Nonetheless, it is necessary to recognise that the incorporation of the ECHR into domestic law has also drawn the judiciary (particularly at its senior levels) further into the political realm by, in effect, requiring judges to give “moral answers to moral questions”.<sup>34</sup>

### *A challenge to parliamentary sovereignty?*

This expansion of the constitutional role of the judiciary as a check on executive power has corresponded with an increasing recognition of the rule of law as “the basic foundation of our democracy”.<sup>35</sup> Indeed, some have asserted that, in certain circumstances, this concept can now trump parliamentary sovereignty, raising the possibility that an even more fundamental shift has occurred in the relationship between the courts and parliament. The most famous example comes from Lord Steyn:

“The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom....In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts...a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.”<sup>36</sup>

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34 Lord Browne-Wilkinson, quoted in R Stevens, ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’, *Legal Studies*, Volume 24, Issue 1-2, pp. 1-34, 2003

35 MOJ consultation paper, ‘Appointments and Diversity: A Judiciary for the 21st Century’, 2011

36 Lord Steyn, quoted in, Lord Bingham of Cornhill, ‘*Jackson v Her Majesty’s Attorney General*’, UKHL, 2005

Although, so far as is known, not a majority view within the senior judiciary, similar comments can be found from Lady Hale and Lords Hope, Woolf and Phillips.<sup>37</sup> However, the very presence of these assertions in mainstream discussion is evidence of the distance travelled from Lord Greene's traditional stance. In constitutional theory, the courts do remain limited by parliamentary sovereignty. In *practice*, however, this limitation has been significantly diluted by membership of the European Union, the incorporation of the ECHR and the political implications of any attempt to repel judicial attempts to uphold fundamental constitutional rights. This divergence is well illustrated by Jack Straw:

"It is all very well saying that Section 4 [of the HRA] is very elegant because all it does is provide for a declaration of incompatibility.<sup>38</sup> That is true; legislation cannot be overruled—but, by God, the moment that happens, there is an unexploded bomb in the middle of a Minister's room and you have to work out what to do with it."<sup>39</sup>

### *Constitutional Reform Act 2005 and a new Supreme Court*

The explicit move towards a purer 'separation of powers' contained in the CRA 2005 both evidenced and further enhanced this expanded role of the judiciary. Due in part to the increased judicial involvement in the sphere of political decision making, it was rightly deemed inappropriate to retain the previous degree of interconnectivity between the judiciary and the other branches of state if the key principle of judicial independence was to be protected (both in fact and appearance). As such, the highest court in the land was removed from its seat within the legislature and the United Kingdom Supreme Court was created. At the same time, the appointment of judges ceased to be largely the preserve of the executive, with the judiciary itself taking on a far more influential role in the process

37 Phillips: "If parliament did the inconceivable, we might do the inconceivable as well...one is envisaging a situation where a strong majority in parliament enacted a piece of legislation that produced a complete public outcry because it was opposed to some fundamental constitutional principle, then one might say that the Supreme Court might react". The Today Programme, BBC Radio4, August 2, 2010.

38 If a court determines that a statutory provision breaches the HRA, it cannot directly strike out the offending section. Instead, it must inform parliament by issuing a 'declaration of incompatibility', therefore technically leaving any subsequent alteration of the legislation to parliament's discretion. It is worth noting, however, that in every case to date in which the courts have issued a declaration of incompatibility, parliament has acted to amend the relevant legislation.

39 Evidence before the Constitution Committee, Autumn 2011. It is worth noting that in every case to date in which the courts have issued a declaration of incompatibility, Parliament has acted to amend the relevant legislation.

as part of the newly formed independent appointing commissions (discussed in detail in Chapter 2), thus filling the power vacuum created by the executive's recusal.

In reality, the new Supreme Court possesses few more powers than its former incarnation in the House of Lords. Although in this sense the move was largely symbolic, "symbols can have unexpected results".<sup>40</sup> As the Lord Chancellor responsible for implementing the changes puts it:

"The Supreme Court will be bolder in vindicating both the freedoms of individuals and, coupled with that, being willing to take on the executive."<sup>41</sup>

Thus, for Kate Maleson, the impact of form on substance will ensure that:

"The establishment of a new body, bearing the title of Supreme Court with a clear and distinct identity, housed in its own building is likely to accelerate the trend towards a strengthening judicial role."<sup>42</sup>

### *Tension between the executive and the judiciary*

It is perhaps unsurprising that such a significant rise in the power of the judiciary vis-a-vis the other branches of government should lead to heightened tensions, particularly in relation to the executive, whose power the judges have increasingly looked to restrain. Thus, the last 20 years have been marked by frequently strained relationships between government ministers and the judiciary (although matters did improve in the era of Lord Bingham and Lord Falconer), leading a former Attorney General, Lord Rawlinson, to recently state that – in 50 years experience - he had never known "such antagonism as there is at the moment between the judiciary and the executive"<sup>43</sup>.

The Constitution Committee has heard that, contrary to convention, members at all levels of the judiciary have found themselves "somewhat under siege as a result of political criticism".<sup>44</sup> Prime

40 Lord Woolf, 'The Pursuit of Justice', ed. by Christopher Campbell-Holt, Oxford University Press, 2008, p. 126

41 Lord Falconer, quoted in K Maleson, 'The evolving role of the Supreme Court', Public Law, October 2011 pp. 754-772

42 K Maleson, 'The evolving role of the Supreme Court', Public Law, 2011

43 Quoted in A Horne, 'The Changing Constitution: A Case for Judicial Confirmation Hearings?', 2010

44 Plumstead, evidence before the Constitution Committee, Autumn 2011

Ministers, Home Secretaries and other ministers from across the political spectrum have openly attacked judicial decisions: Tony Blair criticised an asylum decision as ‘an abuse of common sense’<sup>45</sup>, David Cameron weighed in on the undesirability of the perceived (and much publicised) judicial development of privacy law<sup>46</sup>, Labour Home Secretaries Blunkett and Clarke were near apoplectic in relation to a series of security matters and Theresa May has recently been embroiled in a debate concerning a cat.<sup>47</sup>

Whilst a degree of tension between the separate arms of state is not necessarily a bad thing, there is a real sense in which the contemporary climate is potentially corrosive of judicial authority and therefore also legitimacy and independence itself. Indeed, the key thrust of this executive criticism is invariably linked to the perceived expansion of the judicial role into the political sphere without any notable corresponding increase in the accountability for that power. Attacks on the legitimacy of ‘unaccountable’, ‘unelected’ judges acting in a manner characterised as “dismissive of the elected Parliament”<sup>48</sup> have become the standard refrain.

### *The myth of ‘mechanical jurisprudence’*

It is precisely this lack of any corresponding increase in accountability that leaves the judiciary vulnerable to criticisms in relation to their new role. Without a more solid basis to justify their expanded power, some members of the judiciary have given the impression of embracing a theory of ‘mechanical jurisprudence’ in the face of such attacks. Thus, for the Lord Chief Justice, Lord Judge:

“the introduction of the European dimension to our law and the increasing use of judicial review of government action in particular has not altered the basic principle, which is that we try to *discover the law, and...having discovered it, we say what it is*” [emphasis added].<sup>49</sup>

Similarly, for Lord Kerr, the Supreme Court is emphatically not involved in “the creation of policy”: “*We are not creating law;*

45 BBC, ‘Blair dismay over hijack Afghans’, May 2006, [news.bbc.co.uk/1/hi/uk/4757523.stm](http://news.bbc.co.uk/1/hi/uk/4757523.stm) (last accessed on 16 March 2012)

46 Owen Bowcott, ‘Privacy law should be made by MPs, not judges, says David Cameron’, April 2011, [www.guardian.co.uk/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law](http://www.guardian.co.uk/media/2011/apr/21/cameron-superinjunctions-parliament-should-decide-law) (last accessed 16 March 2012)

47 [www.bbc.co.uk/news/uk-politics-15160326](http://www.bbc.co.uk/news/uk-politics-15160326)

48 J Denham MP, ‘This is a clash between the courts and elected MPs’, Independent, 30 June 2006

49 Evidence before the Constitution Committee, Autumn 2011

*we are applying the law*" [emphasis added].<sup>50</sup> This image of the judge as the finder of buried treasure rather than the exerciser of creative choices is hard to square with Lord Bingham's views on the judge as law maker<sup>51</sup> and Lord Reid's 1972 dismissal of the notion of mechanical jurisprudence: "we don't believe in fairy tales anymore".<sup>52</sup> Lord Radcliffe was equally forthright:

"[T]here was never a more sterile controversy than that upon the question whether a judge makes laws. Of course he does. How can he help it?"<sup>53</sup>

As Robert Stevens notes, the attempt to protect the judicial role by effectively pretending nothing has changed has more than a little of the reasoning of Alice in Wonderland about it: if we say it often enough then it will be true.<sup>54</sup> To see the unsustainability of this position, however, one only needs to read Lord Sumption's recent concern over "the judicial resolution of inherently political issues"<sup>55</sup>. The genie is, in effect, out of the bottle, and no amount of wilful denial will squeeze it back in. If (as we do) we want to retain a robust judiciary with real power to protect individual and minority rights from executive excess, then it is something that must be addressed.

### Putting judicial power on a more solid footing

For some, including Sumption himself, the appropriate response to the shift in the boundaries between political and legal decision making is for the judiciary to retreat to the "shallow end".<sup>56</sup> However, this solution is deeply problematic. Whatever the historical and constitutional ideal, the current position regarding executive power is clearly that described by Sir Jack Beatson: "while the House of Commons in theory controls the government, save exceptionally, it is the government which controls the House".<sup>57</sup>

Both in relation to the expanded powers of judicial review and the

50 Indeed, in every case to date in which the courts have issued a declaration of incompatibility, Parliament has acted to amend the relevant legislation.

51 T Bingham, 'In The Business of Judging', Oxford University Press, 2000

52 Lord Reid, 'The judge as law maker', 12 Journal of the Public Society of Teachers of Law 22, 1972

53 Quoted in R Stevens, 'The English Judges: Their Role in the Changing Constitution', Hart Publishing, 2002 p33

54 R Stevens, 'Reform in haste and repent at leisure', Legal Studies, 2003

55 Sumption, Mann lecture, 2011

56 C Gearty, 'Are judges now out of their depth?', JUSTICE Tom Sargant memorial annual lecture, London, October 2007

57 Justice Beatson, 'Reforming an Unwritten Constitution', 31st Blackstone Lecture, Pembroke College, 16 May 2009

preservation of fundamental human rights, the judiciary fulfils a key constitutional and social function in the protection of individual and minority rights within our democracy. Indeed, so vital is it that, for some, the imperative of preserving it almost precludes the introduction of any significant measures to make the judiciary accountable for the power they wield. Thus, Aharon Barack, former president of the Supreme Court of Israel, argues that someone has to protect the fundamental rights of the minority in a democracy and fully independent judges are the best (or perhaps 'least worst') solution.<sup>58</sup> As Roger Smith of JUSTICE puts it, "I think that the question [is]: who guards the guards? I think that it has to be the judges."<sup>59</sup>

However, this is itself equally unacceptable in a democratic society. By definition, 'self-guarding guardians' belong in an oligarchy *not* in a democracy in which authority is derived directly (and exclusively) from the body politic. Furthermore, as is evident, any such accountability deficit is highly problematic in the context of democratic decision-making, leaving the judiciary a hostage to attack.

It follows that it is instead necessary to explore mechanisms that can inject a degree of accountability into the system without undermining judicial independence. Only by achieving this can the expanded judicial role be put on a sufficiently solid footing. The paramount importance of preserving the independence of sitting judges ensures that the key to this is, as outlined in the following chapter, to focus on the process by which judges – particularly those in the more politically significant senior courts – are *appointed*.<sup>60</sup> By doing so it is possible to enhance the legitimacy of the judges themselves and the role they perform and thus benefit both the judiciary and the society it serves.

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58 A Barak, 'The Judge in a Democracy', Princeton University Press, 2006

59 Evidence before the Constitution Committee, Autumn 2011

60 See generally A Paterson, 'Judges and the public good: reflections on the last Law Lords' in A Paterson, "Lawyers and the Public Good: Democracy in Action", Cambridge University Press, 2012

## ■ 2 - Current senior judicial appointments: the democratic deficit

*“Journalists, academics, and politicians will become more aware of this powerful institution, and questions will be asked about the way its members are chosen. The failure to address the democratic deficit in the selection process to the Supreme Court is likely to become increasingly problematic.”<sup>61</sup>*

**Professor Kate Malleon**

At the heart of the attempt to find the ‘elusive balance’ between the touchstones of accountability and independence in relation to the senior judiciary is the process by which they are appointed. Once appointed it is, rightly, virtually impossible to remove a sitting judge – this protection is an essential aspect of judicial independence. It is therefore only at the appointments stage of the process that the necessary degree of accountability – and with it legitimacy - can be introduced into the system in a manner that does not significantly impact on independence. Indeed, as outlined in the introduction, the legitimacy of the judicial branch to adjudicate on the laws passed by elected officials rests heavily on the constitutional legitimacy of the appointments system by which the judges come to hold this power in a democratic society.

### Senior judicial appointments process in theory

#### *The background and CRA 2005*

Historically, the appointment of judges at all levels in England and Wales has been under the control and at the choice of the Lord Chancellor (with support from his department and some

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61 K Malleon, ‘Parliamentary scrutiny of Supreme Court nominees: a view from the United Kingdom’, *Osgoode Hall Law Journal*, Volume 44, Issue 3, 2006

limited input from the wider judiciary). As the power of the senior judiciary increased, however, politicians rightly (although perhaps somewhat paradoxically) came to accept that a purer separation of powers requires that the executive play a much reduced role in the appointment of its fellow branch of government. The question was, therefore, who would fill the power vacuum when the executive stepped back. Understandably, given their expertise in what judging requires, it was thought – both by themselves and others – that the judges should step into the breach.<sup>62</sup>

Accordingly, three independent appointing commissions were established with a heavy judicial influence: the Judicial Appointment Commissions of England and Wales and of Northern Ireland and (with rather less judicial sway) the Judicial Appointments Board in Scotland (together, ‘the regional JACs’). These permanent statutory bodies are now responsible for appointments to the High Court and below and are composed exclusively of judges, lawyers and lay persons (i.e. there is no political membership).

For senior judicial posts, however, the CRA 2005 mandates that separate, ad-hoc appointing commissions – composed in accordance with stipulated statutory criteria - should be convened as and when a relevant vacancy arises. An examination of these commissions reveals a significant issue, one in fact anticipated with some prescience by Tom Legg, former Permanent Secretary to the Lord Chancellor’s Department:

“It is hard to imagine such [commissions] without a contingent of senior judges. They would inevitably have a heavy, and often a predominating, influence. It is no reflection on our judges to say that this would be undesirable. *No branch of government should be effectively self-perpetuating.*”<sup>63</sup> [emphasis added]

### Supreme Court appointment process<sup>64</sup>

For each separate Supreme Court selection process, a new five-member selection commission is convened. This panel is always chaired by the current President of the Court. The second member is the Deputy President of the Court. The other positions on the ad-hoc

62 For greater detail on the development of the CRA 2005 judicial appointments processes see A Paterson, ‘Judges and the public good: reflections on the last Law Lords’ in A Paterson, “Lawyers and the Public Good: Democracy in Action”, Cambridge University Press, 2012

63 T Legg, ‘Judges for the New Century’, Public Law, Volume 62, Issue 73, 2001

64 The procedure for appointing a Justice of the Supreme Court of the United Kingdom is governed by Sections 25 to 31 and Schedule 8 of the CRA 2005.

panel are filled by a member from each of the regional permanent JACs (as selected by the Chairman of the relevant JAC). At least one of these members must be a lay person. There is no stipulation as to the need for a gender or ethnicity mix on the selecting panel.

Parliament has explicitly affirmed in CRA 2005 that- as an alternative to having held high judicial office for at least two years - anyone with 15 years practising experience as either a solicitor or a barrister may apply to fill a Supreme Court vacancy.

As part of the selection process, the ad-hoc appointing commission is required to consult on the merits of prospective Supreme Court candidates with a stipulated list of individuals including other members of the senior judiciary (including all remaining Supreme Court justices, the Lord Chief Justice and the Master of the Rolls), the Lord Chancellor, the First Ministers of Scotland and Wales and the Secretary of State for Northern Ireland.<sup>65</sup>

The appointing panel is required to make a selection 'on merit'.<sup>66</sup> In doing so, it must ensure "that between them the Judges [of the Supreme Court] will have knowledge of, and experience of practice in, the law of each part of the United Kingdom".<sup>67</sup> This requirement is designed to ensure that there is continued representation from both Scotland and Northern Ireland on the Supreme Court.

Once the panel has concluded on a single name for a vacancy, this is passed to the Lord Chancellor who must carry out another round of consultations with the same individuals listed in the statute. The Lord Chancellor then retains a limited right of veto and can reject once the name put forward by the panel (but is afterwards bound by their second selection). This veto power is entirely negative in substance (i.e. it does not allow the Lord Chancellor to indicate a preferred candidate).

### *Appointments process for other senior judicial roles*

#### *Lord Chief Justice<sup>68</sup>*

Under the CRA 2005 the Lord Chief Justice became the head of the judiciary and President of the Courts of England and Wales. With the move towards a purer separation of powers, this role took on far

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65 Although due to devolution issues, it is understood that the Northern Ireland consultee is now in practice the chair of the respective JAC, the Chief Justice of Northern Ireland (who is therefore effectively consulted twice).

66 Section 27 (5) CRA 2005

67 Section 27 (8) CRA 2005

68 See sections 67 – 75 CRA 2005

greater significance, with increased administrative (in relation to the expanded judicial responsibilities over the operation of the courts) and political (as a liaison with the other branches of government) functions.

The Lord Chief Justice is appointed by a four person ad-hoc panel chaired by the most senior England and Wales Supreme Court Justice who is not disqualified (e.g. by being a candidate). In the event of a tie, the chair has a casting vote. The second member of the panel is a member of the senior judiciary chosen at the discretion of the chair. The third member is the Chair of the England and Wales JAC who also selects the fourth member from among the lay membership of that JAC. The single name put forward by this panel is appointed, subject to the same limited veto power from the Lord Chancellor as exists in relation to Supreme Court appointments.

#### *Heads of Division<sup>69</sup>*

The Heads of Division are the most senior judges at the apex of the separate strands of the judiciary (contained within the High Court and the Court of Appeal). Again, due to the greater separation of powers and increase in the judicial control over the court system, these roles have increased in constitutional significance under CRA 2005. These Heads of Division are appointed in the same way as the Lord Chief Justice with the exception that the Lord Chief Justice himself becomes the second member of the panel. The most senior England and Wales Supreme Court judge remains the chair with a casting vote where necessary.

#### *Court of Appeal judges<sup>70</sup>*

Court of appeal judges are also appointed by a four person panel, with the Lord Chief Justice as chair (with a casting vote where necessary). The second member is a current Court of Appeal judge or Head of Division chosen at the discretion of the Lord Chief Justice. The third and fourth members are selected in the same way as for the Lord Chief justice, with the Lord Chancellor retaining the same limited veto.

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69 See sections 67 – 75 CRA 2005

70 See sections 76 - 84 CRA 2005

## Senior judicial appointments process in practice

### *Judicial influence on appointing panels*

It is therefore very clear that in relation to the appointments process for each of the individual roles within the senior judiciary, the senior judiciary itself is playing a pivotal role.

In the appointment of the Lord Chief Justice, the Heads of Division and Court of Appeal judges, the casting vote given to the chairman ensures that there is a majority judicial influence on *every single appointing panel*.

In relation to the Supreme Court specifically, two of the five members on any panel will always be the President and Deputy President of the Supreme Court itself (even when appointing their own direct replacements). This is already a heavy (and indeed, exceptionally powerful) judicial presence:

“These two judges, the most senior in the entire judiciary, must in practice *have a predominant influence* over the three representatives of the United Kingdom appointment commissions who comprise the remainder of the commission.”<sup>71</sup> [emphasis added]

In practice, however, the judicial influence on appointments to these positions is greater than this. To date there have been four panels convened to appoint new Justices of the Supreme Court using the procedure stipulated in the CRA 2005.<sup>72</sup> On every occasion, the two Supreme Court justices have been joined by another serving judge from a lower court. This has ensured that in relation to the eight Supreme Court justices appointed under the procedures, there has *always* been a majority of judges on the appointing panel itself. It is also likely to have the further effect of again increasing the influence of current Supreme Court members in the appointment of their colleagues, as Lord Justice Etherton notes:

“You can see there the difficulties of the dynamics of having a junior judge on the United Kingdom Supreme Court appointments panel with the President and the Deputy President. The dynamics there are very, very difficult.”<sup>73</sup>

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71 T Legg, written evidence to the Constitution Committee, Autumn 2011

72 The first being a voluntary use of the procedure before the Act officially came into force.

73 Evidence before the Constitution Committee, Autumn 2011

This influence is enhanced still further by the process of statutory consultations, which feed in the views of *every Supreme Court Justice on every candidate*. This inevitably means that the Supreme Court is playing a very large part in the determination of its own composition.

### A standard Supreme Court appointment process

It is worth breaking this process down in detail. In total, a standard Supreme Court appointment process currently involves the direct input of up to 26 individuals, 20 of whom are members of the senior judiciary and one is a more junior judge (the remainder being the lay commissioners and the other statutory consultees). However, in practice, the judicial influence is again even greater. The input of the Lord Chancellor is, as discussed, primarily that of a negative veto that operates only at the very end of the process and, according to Lord Falconer, it is his experience that the relevant First Ministers do not treat Supreme Court appointments “as a particularly high-priority issue”.<sup>74</sup> Furthermore, it is understood that the Northern Ireland consultee is now in practice the chair of the regional JAC - mandated to be the most senior Northern Ireland judge - rather than the Secretary of State.

As a result, the key contributions to the assessment of the merits and demerits of all candidates<sup>75</sup> for appointment to the apex of the judiciary come from around 21 judges (20 of them from within the senior judiciary) and two lay members.<sup>76</sup> It would be difficult to get clearer evidence of the potential danger for this branch of government to become a “self-perpetuating oligarchy”.<sup>77</sup>

At the core of the rationale behind affording the senior judiciary such a dominant influence in the appointment of the senior judiciary appears to be an extension of the attempt to protect judicial independence in the context of the separation of powers. However, this is a fundamental misconception:

74 Evidence before the Constitution Committee, Autumn 2011

75 It is understood that consultations are currently carried out prior even to the short-listing of candidates.

76 It is important to note that this is not to imply that the lay members do not make significant, robust contributions to the work of the panel, but simply to illustrate that the sheer weight of numbers is stacked against them.

77 R Stevens, ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’, *Legal Studies*, Volume 24, Issue 1-2, pp. 1-34, 2003

“Of course the separation of powers is an important underlying factor in the appointment and operation of the judges, but that principle cannot be an absolute one in relation to the appointment of judges because the judges cannot be purely a self-appointing body.”<sup>78</sup>

It is in no way disrespectful to the judges themselves to recognise that it is deeply problematic in a democracy for one branch of state to have anything like a decisive voice in choosing their own colleagues and successors.

### *The inability to promote succession planning*

One largely unremarked weakness of the system of ad hoc appointing panels for senior judicial appointments relates to the lack of machinery or impetus to promote succession planning. By definition, these panels are concerned with a ‘snap-shot’ picture and lack a consistency of membership or approach. With the retention of 70 as the retirement age for most Supreme Court justices, any candidate who works their way through the High Court and the Court of Appeal will have to be appointed at a comparatively young age if they are to stay for long in the Supreme Court. The turnover in the Supreme Court membership between 2009 and 2013 will be over 50%, raising issues of continuity. What is required is a process whereby, as in the days of appointment by the Lord Chancellor, the appointing body can actively take account of the longer term institutional needs of the senior judiciary and the Supreme Court in particular.

### *The potential for conflicts of interest*

As outlined above, each Supreme Court appointment involves a process of statutory consultations with members of the senior judiciary (along with a limited number of relevant political figures). In addition to the increased opportunity for self replication, this process also carries other significant problems. The first is that it “can be seen as riven by potential conflicts of interests”<sup>79</sup>, with those being consulted on the merits of each candidate perhaps inevitably having potentially close links with colleagues who are applying. Similarly, the current composition of the Supreme Court appointing panel itself has no satisfactory mechanism for dealing with conflicts of interest in relation to the President and Deputy President of the Court. The second related issue is that parliament’s express wish

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78 Lord Justice Etherton, evidence before the Constitution Committee, Autumn 2011  
79 F Gibb, ‘Supreme ambition, jealousy and outrage’, The Times, 4 February 2010

to leave appointments to the highest court open to high quality candidates from non-traditional (i.e. non-judicial) backgrounds can come into conflict with an apparent sentiment among some members of the senior judiciary that Supreme Court appointees should first ‘earn their spurs’ in the Court of Appeal.

Both of these issues became apparent in recent Supreme Court appointments processes.<sup>80</sup> In 2008, Jonathan Sumption QC was given a clear indication that he would be the next Supreme Court appointee when Lord Neuberger left to become Master of the Rolls. According to Frances Gibb (and Joshua Rozenberg), however, the proposed appointment of Sumption caused much consternation among some members of the senior judiciary, who objected to the promotion of a practising barrister ‘over the heads’ of serving members of the Court of Appeal (who had worked their way through the judicial ranks). As such, Gibb asserts that his appointment was “effectively blocked after concerted opposition from Court of Appeal judges...backed by some Supreme Court judges”.<sup>81</sup>

Although Sumption was appointed to the Supreme Court in a later contest, this episode suggests that there is a school of thought within senior judicial ranks which prefers to approach appointments to the highest court in a narrower manner than the words that parliament has used.<sup>82</sup> If unchecked, this line of thinking will inhibit diversity in appointments and may well explain the relative homogeneity of career paths onto the UK Supreme Court in direct contrast to other jurisdictions, where “most other top courts draw their members from a far wider range of career backgrounds”.<sup>83</sup>

### The need to address the democratic deficit

The push for a purer separation of powers and the corresponding removal of judicial appointments from the hands of the executive was understandable and appropriate in the context of the enhanced role of the judiciary. However, this removal of the executive left a vacuum and it is a vacuum that has, in large part, been filled by the judiciary itself. We have, in effect, “gone from one extreme to the other”.<sup>84</sup>

80 See F Gibb, ‘Judges oppose appointment of Sumption QC to the Supreme Court’, *The Times*, 15 October 2009 and ‘Supreme ambition, jealousy and outrage’, *The Times*, 4 February 2010

81 F Gibb, ‘Supreme ambition, jealousy and outrage’, *The Times*, 4 February 2010

82 Section 25 of the CRA 2005 expressly opens up appointments to the Supreme Court from out with the Court of Appeal.

83 K Maleson, ‘Appointments to the House of Lords: who goes upstairs’ in L Blom-Cooper, B Dickson and G Drewry (eds), ‘The Judicial House of Lords 1876-2009’, 2009. This also has significant implications in terms of diversity as discussed in Chapter 4.

84 Lady Hale, evidence before the Constitution Committee, Autumn 2011

It is fully understandable that the judges should feel that they know best what the 'judging job' requires and this expertise should unquestionably be given its place. However, the extent of the judicial involvement in the current system of appointments is problematic in a mature democracy. This is particularly so in relation to the Supreme Court appointing panel which effectively "sets the tone for the whole of the judiciary".<sup>85</sup> In the context of the increasingly porous boundaries between legal and political decision making, the constitutional implications of appointments to this institution are profound.

In relation to this there has been, quite rightly, a significant focus on the inappropriateness – explicitly recognised by Lord Philips himself – of the President of the Supreme Court chairing the panel that appoints his own successor. This is flawed not just from a constitutional perspective but from a basic HR stance and is clearly unsustainable.<sup>86</sup> However, to concentrate on this at the expense of the more fundamental problems with the broad make-up of the Supreme Court appointing panel and the wider appointments process is to become fixated on the icing and neglect the cake. The broader, dominant extent to which the senior judiciary is involved in the selection of the senior judiciary is, as Lord Justice Etherton notes, "quite unacceptable...for constitutional legitimacy".<sup>87</sup>

As outlined in the introduction, at the heart of the defining concept of the rule of law is compliance based on legitimacy. To return to the key touchstone of accountability, the legitimate exercise of power in the political sphere in a democratic society requires some degree of connection between the office holder in question and the public from whom that power is derived. As Lady Hale notes, the process of Supreme Court appointments "currently lacks any democratic accountability"<sup>88</sup> – it involves no input whatsoever from the legislature, minimal input from the executive and actually requires no participant with a substantive role to be an elected office-holder. While undoubtedly crucial, judicial independence cannot be an absolute.

Particularly in light of the new constitutional settlement, it is important to recognise that the appointment of senior judges is, in the broad sense, a political act. As such, it is "for the long-term health, quality and therefore standing and independence of the

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85 Baroness Neuberger, evidence before the Constitution Committee, Autumn 2011

86 See Jack Straw's comment to the Constitution Committee that such a procedure would "not be acceptable anywhere these days".

87 Evidence before the Constitution Committee, Autumn 2011

88 Written evidence to the Constitution Committee, Autumn 2011

senior judiciary [that] there should also be an equal involvement of [the] other branches of government".<sup>89</sup> In the context of the expanded role and political significance of the judiciary, it is more important than ever to protect the legitimacy of this branch of government by ensuring that it is buttressed by a constitutionally appropriate appointments process. The current method of appointing our senior judiciary – and our Supreme Court Justices in particular – is, in short, not fit for purpose.

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89 T Legg, written evidence to the Constitution Committee, Autumn 2011

### ■ 3 - Current senior judicial make-up: the diversity deficit

*"The present imbalance between male and female, white and black in the judiciary is obvious.... I have no doubt that the balance will be redressed in the next few years."*<sup>90</sup>

**Lord Taylor**

Lord Chief Justice, 1992

*"A woman litigant should be able to go into the Court and see more than one person who shares at least some of her experience. I should not stick out like a bad tooth, as I do at present."*<sup>91</sup>

**Lady Hale**

Supreme Court Justice, 2012

The third touchstone in judicial appointments is that of diversity: the concept that the institutional legitimacy of the judiciary as a branch of government is in some way linked to its reflection of the society it serves.

#### Current senior judicial make-up

The make-up of the judiciary from the High Court level and above is set out in Figure 2. This might loosely be described as the 'politically significant' judiciary – the judges involved in the day to day review of government decision-making outlined in Chapter 1. The lack of diversity is striking.

The picture is even starker in relation to the senior judiciary – those at the apex of the judicial branch of government with a significant involvement in the political sphere (as set out in Figure 3). Of these

90 C Thomas, 'Judicial diversity in the United Kingdom and other jurisdictions: A review of research, policies, and practices', The Commission for Judicial Appointments, November 2005

91 Written evidence to the Constitution Committee, Autumn 2011

Figure 1 – estimated UK population break down<sup>i</sup>

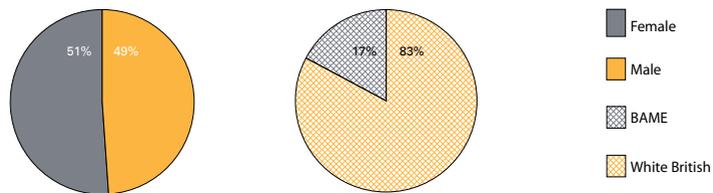


Figure 2 – composition of judiciary at High Court level and above<sup>ii</sup>

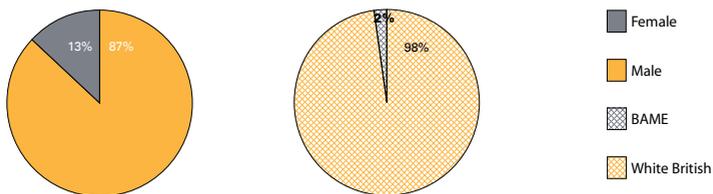


Figure 3 – composition of the senior judiciary<sup>iii</sup>

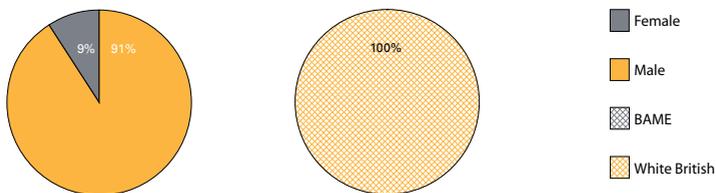
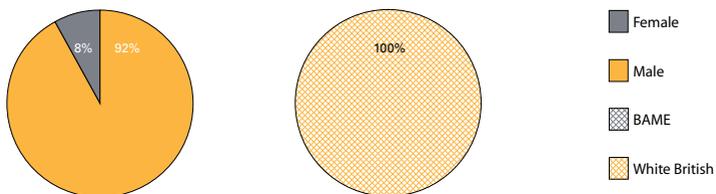


Figure 4 – composition of the Supreme Court<sup>iv</sup>



i ONS data

ii Compiled from [www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview](http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview) and [www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/list-of-members-of-the-judiciary/senior-judiciary-list](http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/list-of-members-of-the-judiciary/senior-judiciary-list)

iii ibid

iv ibid

54 senior positions (comprising the Lord Chief Justice, the Heads of Division and the judges of the Court of Appeal and Supreme Court), only five (around 9%) are held by women and none at all (0%) by individuals of BAME origin. This marks an increase of only four senior female judges in the 20 years since Lord Taylor's comment – an average of one more every five years.

Perhaps most importantly, the highest court in the land itself – described by Lord Justice Etherton as “now primarily a policy-making body”<sup>92</sup> – is composed of 11 white men and one white woman. Thus, as the comparative international table in Figure 5 makes abundantly clear:

“There is a real possibility that the continued failure of the system to increase judicial diversity will weaken our international standing among the leading judiciaries of the world, which now have significant numbers of women judges at the higher levels and in leadership positions.”<sup>93</sup>

Or, as Roger Smith of JUSTICE more succinctly puts it: “We are shamed by the picture of our Supreme Court when placed against the [international] equivalents”<sup>94</sup>.

From this evidence, the spectacular failure of Lord Taylor's prediction to come to fruition is all too apparent. Indeed, this striking failure of the judiciary to reflect society is now the judiciary's ‘Achilles Heel’ as seemingly “the main thing that lay persons know about our judges”.<sup>95</sup>

However, although most senior judges and commentators now accept that diversity is a significant problem, they are sharply divided as to what should be done about it. Indeed, while witness after witness before the Constitution Committee in the autumn of 2011 lamented the failure to make significant progress, only a minority were prepared to countenance reform that would have an impact at the senior end of the judiciary within the foreseeable future. Despite the failure of the ‘trickle up’ theory to have any notable impact in the last 20 years, there are still those advocating patience. Indeed, the Lord Chancellor himself has commented that:

“The steady increase in the number of women on the Bench and the seniority at which they occur, ethnic

92 Evidence before the Constitution Committee, Autumn 2011

93 Lady Justice Arden, written evidence to the Constitution Committee, Autumn 2011

94 Evidence before the Constitution Committee, Autumn 2011

95 S Turenne, ‘Vacancies at the Supreme Court’, Cambridge Student Law Review, Volume 4, 2011

minority representation ... it is all coming along steadily...  
I hope the process continues."<sup>96</sup>

It is worth noting that, should the 'process' continue at the same rate it has in the period since Lord Taylor's comment, gender parity alone in the senior judiciary will take almost a century to attain. Speaking bluntly, it is unlikely that the credibility of our judiciary can wait even a further two decades. As Maleson indicates, the lack of diversity is in real danger of having a "corrosive impact...on the legitimacy of the judiciary [which] is now too great to ignore".<sup>97</sup> There have so far been eight appointments using the CRA 2005 Supreme Court appointing procedures; all eight have been white men. The very health of the judiciary itself necessitates the recognition that "the pace of change is too slow and something needs to be done about it urgently".<sup>98</sup> Positive noises are simply no longer enough.

### The constitutional rationale for a diverse judiciary

It is important to emphasise that the absence of a diverse judiciary raises fundamental constitutional issues. The first is the normative recognition that, in a democracy, the authority of the judicial branch of government rests heavily on its perceived legitimacy and a central aspect of this legitimacy is its relationship to and reflection of the society it serves:

"In the contemporary world, where democratic commitments oblige equal access to power...the composition of a judiciary – if all-white or all-male or all-upper class – becomes a problem of equality and legitimacy."<sup>99</sup>

Similarly, Lady Hale argues that:

"I believe that the lack of diversity on the Bench is a constitutional issue. Judges both enforce the law against the people and protect the people against the state. Everybody should be able to see the courts as their courts, there for all sections of society and not just for some. Fairness and equality are central values in the law and the courts should reflect this."<sup>100</sup>

96 Annual meeting of the Lord Chancellor with the Constitution Committee, 19 January, 2011  
97 K Maleson, "The new judicial appointments commission in England and Wales", in K Maleson and P Russell eds., 'Appointing Judges in an Age of Judicial Power', 2006  
98 Lady Justice Arden, written evidence to the Constitution Committee, Autumn 2011  
99 J Resnik, 'Judicial selection and democratic theory: demand, supply and life tenure', 26 *Cardozo L. Rev.* 579 2004-2005  
100 Evidence before the Constitution Committee, Autumn 2011

*Figure 5 – international comparison of the representation of women in senior courts<sup>101</sup>*

Country	Court	Number of women judges	Total number of judges	Representation of women as %
	International Criminal Court	11	18	61.1%
Canada	Supreme Court	4	9	44.4%
Australia	High Court	3	7	42.9%
	European Court of Human Rights	19	47	40.4%
Sweden	Supreme Court	6	16	37.5%
Norway	Supreme Court	7	19	36.8%
USA	Supreme Court	3	9	33.3%
Germany	Federal Constitutional Court	5	16	31.3%
Israel	Supreme Court	4	15	26.7%
Denmark	Supreme Court	5	19	26.3%
South Africa	Constitutional Court	2	10	20%
	European Court of Justice	5	27	18.5%
Iceland	Supreme Court	2	12	16.7%
<b>UK</b>	<b>Supreme Court</b>	<b>1</b>	<b>12</b>	<b>8.3%</b>

101 Figures valid as at February 2012; data collected from court websites or correspondence with the respective courts. This table represents an updated and expanded version of that submitted in written evidence to the Constitution Committee by Erika Rackley (Autumn 2011).

At the very core of the authority of the judiciary – and indeed the claims for and right to significant independence – is its perceived ability to deliver ‘fairness’. Research clearly indicates that a more representative judiciary is linked to increased public perception of the fairness of courts.<sup>102</sup> A judiciary (and a court) that is marked by such an apparent lack of fairness and equality in terms of its composition cannot help but risk significantly undermining its own long-term legitimacy and therefore authority.

The second rationale is of a more substantive nature and relates to the actual decision making of the courts themselves. The law of the land represents the collective moral code of society and applies in relation to the acts and experiences of *all* sections of that society. As an institution, a judiciary that is able to relate to that society – which is imbued with the diverse range of experiences and perspectives that contribute to it – is therefore better placed to deliver justice in that society. In other words:

“a diverse judiciary is, all other things being equal, a better judiciary. It is better not (just) because it is more representative and democratically legitimate, but because it is better positioned to do the job assigned to it – to do justice. *A judiciary is stronger, and the justice dispensed better, where its decision-making is informed by a wider array of perspectives and experiences.*”<sup>103</sup> [emphasis added]

The reason for this is that, because they are ‘men not disembodied spirits’, judicial decisions are inevitably influenced by judicial character and experience.<sup>104</sup> This fact has been recognised so frequently that it should no longer be controversial. As Beverley McLachlin, Chief Justice of the Canadian Supreme Court has said, “jurists are human beings and, as such, are informed and influenced by their backgrounds, communities and experiences”.<sup>105</sup> Similarly, for Lady Hale, “everybody comes to th[e] task with a set of values and perspectives that may lead you to pick different bits of the materials to reason towards an outcome”.<sup>106</sup>

In effect, who a judge is cannot help but impact in some way on how they judge. It is for this reason that it is intrinsically flawed to have

102 C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions’, 2005

103 E Rackley, written evidence to the Constitution Committee, Autumn 2011

104 D Pannick, ‘Judges’, Oxford University Press, 1987 pp. 43-44

105 B McLachlin, ‘Why we need women judges’, International Association of Women Judges 8th Biennial Conference, Sydney, 3-7 May 2006

106 Evidence before the Constitution Committee, Autumn 2011

“the fundamental questions of law that affect us all [being] decided only by people whose experience of life is so very similar”.<sup>107</sup> Diversity of experience enriches the application and development of the law and should therefore be a central aspect of judicial appointments. In short, a diverse judiciary “is more likely to achieve the most just decision and the best outcome for society.”<sup>108</sup>

### The particular relevance of diversity to the senior judiciary

This recognition of the importance of diversity is especially relevant to both the Court of Appeal and, in particular, the Supreme Court, which hear and decide cases as a *collective body*:

“The Supreme Court is a collegiate court, deciding arguable questions of law of general public importance in panels of 5, 7 or 9. Larger panels are becoming much more common. It is essential that the members of those panels are not, and are not seen to be, composed of a largely homogenous group, but bring a range of experience and expertise to their decisions.”<sup>109</sup>

Indeed, it is precisely because of the nature of the decisions involved that the composition of these panels is even more significant. The very fact that the case in question has reached the Supreme Court indicates that it is generally a matter where “the law is on a knife edge”<sup>110</sup> and there will be, in effect, “at least two possible answers to the question”.<sup>111</sup> This reality is readily apparent in the acknowledged fact that the actual composition of the panel itself can directly impact on the outcome of a case. Thus, in Lord Phillips’ view:

“If you sit five out of the twelve justices and you reach a decision 3:2, it’s fairly obvious that if you’d had a different five you might have reached the decision 2:3 the other way.”<sup>112</sup>

107 Lady Hale, written evidence to the Constitution Committee, Autumn 2011

108 Lord Justice Etherton, quoted in E Rackley, written evidence to the Constitution Committee, Autumn 2011

109 Lady Hale, written evidence to the Constitution Committee, Autumn 2011

110 Lord Phillips, BBC Four, ‘The Highest Court in the Land: Justice Makers’, 2011

111 Lady Hale, evidence before the Constitution Committee, Autumn 2011

112 BBC programme. See also B Dickinson, ‘Close calls in the House of Lords’ in J Lee (ed) From House of Lords to Supreme Court, 2011 and generally A Paterson, ‘Judges and the public good: reflections on the last Law Lords’ in A Paterson, ‘Lawyers and the Public Good: Democracy in Action’, Cambridge University Press, 2012

Importantly, it is in these close cases that the need for a diversity of experience and background is most apparent as it is precisely when valid legal reasoning can quite easily lead to differing conclusions that:

“the choice made is likely to be motivated at a far deeper level by the judge’s own approach to the law, to the problem under discussion and to ideas of what makes a just result’.”<sup>113</sup>

The danger of a lack of diversity of input into a collective decision-making process leading to sub-optimal outputs is recognised in the social sciences. This has recently received a degree of prominence in the well established concept of ‘groupthink’ in relation to the financial crisis.<sup>114</sup> As Alison Maitland observes:

“if you get people all from the same background and who have had the same experiences and are on a board or in a team working together, they are less likely to challenge each other and they are less likely to ask difficult questions because they are all thinking in the same way.”<sup>115</sup>

This is equally applicable to a body as elevated as the Supreme Court, as Lady Hale recognises: “You will not get the best possible results if everybody comes at the same problem from exactly the same point of view”.<sup>116</sup>

These conclusions are strongly supported by research on the effects of judicial diversity carried out largely in the US which confirm that the background and world-view of judges do influence cases and that they do so particularly in *close* cases in which the precise legal position is unclear.<sup>117</sup> Furthermore, in relation to collegiate appellate courts specifically, research indicates that in cases decided by a panel of judges from diverse backgrounds:

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113 Lady Hale, quoted in E Rackley, written evidence to the Constitution Committee, Autumn 2011

114 See for example P Thompson, *Women and the New Business Leadership*, Basingstoke / New York, 2011 and A Wittenberg-Cox and A Maitland, *Why Women Mean Business*, John Wiley and Sons Ltd., 2009

115 Katie Allen, ‘Could crash spell doom for City’s boys’ club?’, *The Guardian*, July 2009 [www.guardian.co.uk/business/2009/jul/26/discrimination-financial-institutions-banking-women](http://www.guardian.co.uk/business/2009/jul/26/discrimination-financial-institutions-banking-women) (last accessed 16 March 2012). Quoted in A Horne, ‘The Changing Constitution: A Case for Judicial Confirmation Hearings?’, 2010

116 Evidence before the Constitution Committee, Autumn 2011. See also in relation to this the Myers-Briggs psychological research on differing personality types and team-working.

117 C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions’, 2005

1. the judges on these judicial panels were more likely to debate a wider range of considerations in reaching their judgements than were homogeneous groups of judges; and
2. the existence of such diversity on judicial panels was more likely to move the panel's decision in the direction of what the law requires (i.e. the 'quality' of the decision-making was actively improved).<sup>118</sup>

Similarly, Baroness Neuberger has indicated that the Advisory Panel on Judicial Diversity heard evidence from collective courts in other jurisdictions to the effect that "the diversity of the backgrounds of the members of their courts made a difference to the quality of their decision-making".<sup>119</sup>

In this light, the inappropriateness of the apex of the judicial branch of government in the UK being composed of 11 white men and one white woman becomes all too apparent. Rather than 'political correctness' or tokenism, diversity in fact goes to the very heart of a collegiate court's ability to be fit for purpose. As the appointing body to the South African Constitutional Court explicitly recognises:

"Diversity... is not an independent requirement superimposed on the constitutional requirement of competence. Properly understood, it is a 'component of competence'. The court will not be competent to do justice unless, as a collegiate whole, it can relate fully to the experience of all who seek its protection".<sup>120</sup>

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118 *ibid*

119 Evidence before the Constitution Committee, Autumn 2011

120 Guidelines on questioning of candidates for members of the South African Judicial Service Commission.

*Case study: Radmacher v Granatino (2010)*

Some of these issues concerning the composition of the Supreme Court came to the fore in the recent case *Radmacher v Granatino* in which the Justices were asked to determine how much weight should be granted to a pre-nuptial agreement in divorce proceedings. In English law, 'pre-nups' have never been considered legally binding. However, in this landmark judgement, the court held that – in the right case – such agreements can have decisive or compelling weight.

The court heard the case as a panel of nine. It reached its decision to accord weight to the pre-nuptial agreement by a majority of eight to one. In the majority were the eight male Justices; in the minority was the one female Justice.

Pre-nuptial agreements are generally condemned in mainstream feminist thinking as discriminatory and potentially oppressive against women:

“A pre-nuptial agreement is designed to take away...equality [before the law], to deprive the less powerful party to the marriage of what she – and it is usually she – would otherwise be entitled to.”<sup>121</sup>

In this context therefore, as Lady Hale adds, it is “striking that all the men thought one thing and I thought something else”<sup>122</sup>:

“There is a gender dimension to the issue that some may think ill-suited the decision by a court consisting of eight men and one woman.”<sup>123</sup>

It is important not to be reductive here. It is not being suggested that the gender of the Justices was straightforwardly deterministic in reaching their decision. However, it must be recognised that different experiences and perspectives should have – and should be *seen to have* – a significant role in the delivery of justice by a collegiate court that adjudicates on behalf of society as a whole.<sup>124</sup>

<sup>121</sup> Lady Hale, BBC Four, 'The Highest Court in the Land: Justice Makers', 2011

<sup>122</sup> BBC Four, 'The Highest Court in the Land: Justice Makers', 2011

<sup>123</sup> Interview in the Times, 15 October 2011

<sup>124</sup> See also Hale's comment, having been out-voted 4:1 on another case (McDonald), that it could be that the “physical differences between men and women lead them to have different views of what dignity means in this context. So it is not surprising that women take a different view.” The Times, 15 October 2011.

## 4 - 'Merit' and diversity in senior judicial appointments

*"Not qualified, the best. Surely it is not sufficient just to say X passes muster. You must appoint the best."*<sup>125</sup>

**Lord Irvine**

*"The problem with this whole debate is the assumption that we know what merit is."*<sup>126</sup>

**Lord Goldsmith**

### The roadblock to a diverse judiciary: the exaltation of individual 'merit'

The key to understanding how such a situation can persist lies in the difficult interaction between diversity and the concept of 'merit' in judicial appointments. For senior judicial posts, the statute requires the respective ad hoc appointing commissions to select candidates strictly 'on merit', without any explanation or guidance as to what this actually means.<sup>127</sup> As Lord Bingham puts it, "the term is not self-defining".<sup>128</sup>

Indeed, for Bingham, the concept explicitly "enables account to be taken of wider considerations, including the virtue of gender and ethnic diversity" as components of 'merit'.<sup>129</sup> However, there is a very real sense that, within the judiciary and the legal profession itself, a particular – quite different – understanding of what constitutes individualised merit has come to be treated as a somehow objective and tangible absolute that must effectively trump everything. It is this understanding that has, as a result, come to hold full sway in judicial appointments.

125 Evidence before the Constitution Committee, Autumn 2011

126 Evidence before the Constitution Committee, Autumn 2011

127 Section 27 (5) CRA 2005

128 Lord Bingham, "The Law Lords: who has served" in L Blom-Cooper, B Dickson and G Drewry (eds), 'The Judicial House of Lords 1876-2009', 2009 p126

129 Ibid

This concept can be seen emerging time and again in discussion before the Constitution Committee, as with Lord Irvine's comment above. Similarly, the submission by the judiciary to the CRA 2005 consultation process warns of "becoming so anxious to achieve diversity that sight is lost of *the primacy of merit*", stressing that "the justice system will be debased if *the very best* candidates are not appointed" [emphasis added].<sup>130</sup> Diversity and merit are – in this conception – unrelated, perhaps even antithetical.

As Lord Falconer identifies, this relentless focus on the fine gradations of (a particular conception of) *individualised* merit stems in large part from a peculiar trait of the legal profession itself:

"One of the things that really drives lawyers and judges is the sense of a sort of league table of brilliance... There is the most brilliant lawyer, who is number one, and then number two is the next most brilliant, and it is all league tables. No other profession regards merit in this top-10 sort of way."<sup>131</sup>

The problem with this, as Lord Goldsmith identifies, is the latent assumption that merit is a 'given' – that we know instinctively 'what it is'. What does '*the best*' actually mean?

As Kate Malleson has very clearly shown, 'merit' in the context of judicial appointments is *never* an objective absolute and is *always* a subjective and varying cultural construction based entirely on the perceived qualities required for the position and the pool of available candidates.<sup>132</sup> Or, as Beverley McLachlin puts it: "merit is in the eye of the beholder".<sup>133</sup>

Historically, what has been 'put in' to the definition of 'merit' for judicial appointments has constantly shifted. In Lord Halsbury's day, it apparently included coming from the same party as the Lord Chancellor. At a later point, it was deemed to be a good thing to have had previous political experience before appointment as a judge in the House of Lords. More recently, however, it has been – and in large part still is – the case that: "Merit is regarded as coterminous with having been a junior and a QC at the Bar for 30 years".<sup>134</sup> The

130 Lord Irvine quoted in R Stevens, 'Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World', *Legal Studies*, Volume 24, Issue 1-2, pp. 1-34, 2003

131 Evidence before the Constitution Committee, Autumn 2011

132 K Malleson, 'Rethinking the merit principle in judicial selection', *Journal of Law and Society*, Volume 33, Issue 1, March 2006. This is not to say that appointing commissions do not strive to identify objective evidence in relation to the particular construction of merit in question.

133 Quoted in R Stevens, 'Reform in haste and repent at leisure', *Legal Studies*, 2003

134 Lord Falconer, evidence before the Constitution Committee, Autumn 2011

more outstanding an individual is at this, the more they 'deserve' to be a judge. Tellingly, 'the Bar' represents only around 10 per cent of the legal profession in the UK and, partly through inherent structural issues, is highly unbalanced at senior levels in terms of gender and ethnicity. It is worth reiterating that this approach stands in marked contrast to senior courts in other jurisdictions which draw their members from a far wider range of career backgrounds.<sup>135</sup>

The result is a danger that 'merit' has also therefore become linked – entirely subconsciously – to being white and male:

"One almost inevitable effect of selecting judges from a narrow group is that the characteristics of that group tend to become synonymous with merit."<sup>136</sup>

Thus, as the Master of the Rolls puts it:

"The main problem is the cast of mind. Most of us think of a judge as a white, probably public school, man. We have all got that problem."<sup>137</sup>

This danger of cloning is compounded by the very structure of the appointments process itself in which, as outlined above, the (almost exclusively white and male) senior judiciary are playing a predominating role in the appointment of their colleagues. As McLachlin emphasises:

"Psychologists tell us that human beings have a tendency to see merit only in those who exhibit the same qualities that they possess. Senior lawyers are no exception. So when they look for merit, they tend to look for someone like themselves."<sup>138</sup>

Or, as Lord McNally puts it:

"I have only one problem about the merit criterion. It is often deployed by people who, when you scratch the surface, are really talking about "chaps like us". That is the danger of merit. Who defines it?"<sup>139</sup>

135 K Malleon, 'Appointments to the House of Lords: who goes upstairs' in L Blom-Cooper, B Dickson and G Drewry (eds), "The Judicial House of Lords 1876-2009", 2009.

136 K Malleon, 'The New Judicial Appointments in England and Wales: New Wine in New Bottles?' in K Malleon and P Russell (eds.), "Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world", University of Toronto Press, 2006, pp. 39-55

137 Lord Neuberger, evidence before the Constitution Committee, Autumn 2011

138 B McLachlin 'Why we need women judges', International Association of Women Judges 8th Biennial Conference, Sydney, 3-7 May 2006

139 Evidence before the Constitution Committee, Autumn 2011

Breaking down the prevailing (and exalted) conception of individual ‘merit’ and recognising that it is simply one culturally specific construction is therefore crucial in clearing the roadblock towards a more diverse judiciary.<sup>140</sup> Properly recognised, ‘merit’ in judicial appointments is simply a construct of what we – as a collective society – consider is necessary and desirable for the judiciary in the 21<sup>st</sup> century.

## The need to reconsider the prevailing conception of merit

### *The limitations of the section 159 ‘tie-break’*

The main proposal for increasing judicial diversity contained in the Ministry of Justice consultation is the possible introduction of the section 159 Equality Act ‘tie breaker’ provision (as endorsed by Lord Neuberger and others). With this, when two candidates are deemed to be of equal merit and one of these candidates is from an under-represented group, that candidate can be given priority.

However, partly because the prevailing conception of ‘merit’ in judicial appointments is so imbued with a deep sensitivity to fine gradations in perceived individual qualities of a particular nature – ‘the top ten’ mind-set - such a change would have a very limited impact (particularly at a senior level). As Lord Phillips, the Chair of every Supreme Court selection commission puts it:

“The idea that you have to have exact equality is not going to be realistic... *it is impossible to say that two people are absolutely on a level pegging*; it would be very, very difficult.”<sup>141</sup>

The Constitution Committee has heard extensive evidence of a similar opinion, not least from the Lord Chief Justice and the Chair of the JAC of England and Wales, Christopher Stephens.<sup>142</sup> Indeed, as Erika Rackley points out, this JAC has, since the introduction of the new appointments procedures under CRA 2005, *always* been able to distinguish between candidates.<sup>143</sup> As such, the proposal

140 To see how far from an objective absolute it is even in current application it is only necessary to look at the significant fluctuations in recent contests over the wisdom or even ‘legitimacy’ of appointments direct from private practice.

141 Evidence before the Constitution Committee, Autumn 2011

142 Evidence before the Constitution Committee, Autumn 2011. In fairness, however, there are differing schools of thought on this point. Some have argued that ‘equal’ if viewed in the light of EU jurisprudence should be given the rather broader interpretation of ‘substantially equivalent merit’.

143 E Rackley, written evidence to the Constitution Committee, Autumn 2011

runs the risk of marking merely another positive headline backed up by very little positive impact in terms of addressing the glaring diversity deficit.

### *Relating merit to the needs of the collective institution*

What is instead required is a more fundamental reconsideration of the manner in which 'merit' is determined in relation to judicial appointments, particularly at a senior level. The relentless focus on one (flawed) construction of perceived individual merit must move towards a process in which the needs of the judiciary as a collective institution are central. It is in relation to this that the consideration of the constitutional rationale for a diverse judiciary becomes crucial.

Both the normative ground of enhanced legitimacy and the more substantive aspect of enhanced competence in the delivery of justice are of course highly relevant to the judiciary as a whole. However, they are particularly and pressingly so in relation to the senior judiciary. As emphasised above, the Supreme Court and the Court of Appeal are *collegiate courts* that make binding legal (and increasingly, 'small p political') decisions *as a collective*. The competence of these courts is therefore a *corporate competence*, not simply an aggregation of the individual competences of their individual members. This collective competence – the institutional 'merit' of such a court – must therefore play a much more central role in the process of appointments to it.

Indeed, a relentlessly individualised concept of merit is entirely inappropriate for such a court. In a company, team or collective organisation of any kind it would seem highly unusual to focus exclusively on the individual abilities of a potential member without any consideration of their impact on the collective whole. In a rough sense, it would be akin to a football manager repeatedly signing high-scoring centre-forwards without any view to the wider needs of his side. Yet this is, in large part, the approach adopted in relation to the corporate body that is the ultimate arbiter of law in the UK.

There is, however, an exception to this. In assessing the merits of prospective candidates, the appointing commission is required to ensure "that between them the Judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom".<sup>144</sup> This requirement is designed to ensure that there is continued representation from both Scotland and Northern Ireland

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144 Section 27 (8) CRA 2005

on the Supreme Court (the absence of which would be, according to Lord Mackay, “terrifically damaging”<sup>145</sup>).<sup>146</sup>

To explicitly recognise the impact of geographical representation on institutional ‘merit’ and yet to ignore this idea of collective competence completely in relation to everything else is fundamentally flawed. If, for example, as Lord Phillips suggests, “public law now occupies about half of the time of the Supreme Court”<sup>147</sup>, would it not be logical to be able to expressly take into account the court’s obvious need for a significant degree of public law expertise when making appointments? Would the competence of the court not be greatly weakened if it was composed of members who – although the 12 most ‘brilliant minds’ by one very specific understanding of individual merit – were all lacking in public law experience? Yet, according to the prevailing interpretation outlined by Phillips himself:

“The Act does not permit or provide that the appointing commission should have regard to the composition of the court and any gaps of specialities on the court.”<sup>148</sup>

As outlined in detail above, another significant aspect of the competence of such a court is the ability to relate to the experiences of the society it serves and to bring the range of perspectives that accompany these experiences into the collective decision making process. As such, a court composed of 11 white men and one white woman is running a similar risk of undermining its capacity to fully deliver – and be *perceived* to deliver – justice in a diverse, mature democratic society.

This *does not* mean that it would be desirable to appoint people unable or unqualified to fulfil the role just to redress the imbalance. This would very obviously not be what the court needs as a collective whole. Collective competence will inevitably require a very high degree of individual ability from each of the judges. However, can it really be the case that such ability is the exclusive preserve of, essentially, one section of our society?

What it *does* mean, is that the common conception of diversity as

145 Evidence before the Constitution Committee, Autumn 2011

146 In the Canadian Supreme Court there is a convention that three of its members should come from Quebec, three from Ontario and the remaining three from other provinces, since it is felt to enhance the legitimacy of the court. The convention is rooted not simply in a desire to cater for Quebec’s civilian legal tradition but also to reflect the diversity of experience in different parts of the country in a way that will enhance the public’s sense of ownership of the Court. Interview with Beverley McLachlin, ABC Radio National 13/9/11.

147 Evidence before the Constitution Committee, Autumn 2011

148 Evidence before the Constitution Committee, Autumn 2011

entirely separate to and indeed, at times, directly oppositional to 'merit' falls away. By recognising that the needs of a collective body must be central when making appointments to that body, it becomes clear that diversity and merit are directly aligned and, indeed, inextricably linked. If the collective competence of the Supreme Court would be increased by the appointment of a fully qualified member from an under-represented (or indeed un-represented) group, then, properly understood, *diversity in fact becomes an integral aspect of merit.*

However, as Lord Falconer notes, the 'top-ten mentality' is difficult to shake. One result of this is evident in the attempt to argue that diversity should be increased by a move to what is sometimes called an 'above and below the line' concept of merit. The idea here is that a candidate from an under-represented group should be appointed if they reach a minimum level of qualification at the explicit expense of 'establishment' candidates who are 'better' than them. This leads – entirely understandably – to concerns over tokenism:

“People want to know that they have been appointed on merit and merit alone and they want to walk tall, knowing that that is the basis on which they have been chosen.”<sup>149</sup>

This is only the case, however, precisely because the 'above and below the line' argument is an (entirely understandable) attempt to shoehorn the collective need for diversity into the straight-jacket that is the prevailing construction of individual merit. Importantly, it is this very construct that is itself imbued with the latent assumption that a judge is 'a white, probably public school, man'.

As such, the alternative explicit recognition of the importance of *institutional merit* as a factor in the appointments process is the precise opposite of tokenism. It is the recognition of the pressing need of the collective institution (particularly the senior collegiate courts but also the judiciary as a whole) to *correct* the damaging imbalance created by the very assumption that Lord Neuberger identifies.

The understanding of merit for appointments to the Supreme Court (and also the Court of Appeal) should therefore be altered to reflect the need to give primacy to the collective competence of the court (in accordance with a new statutory test as outlined in Chapter 7). With this, a person will – importantly - only be appointed when they

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149 Christopher Stephens, evidence before the Constitution Committee, Autumn 2011

are the *best* candidate. They will be the best candidate because they *best reflect what would be most beneficial to the court* (and, as a direct result, the society it serves). Surely this is what 'merit' in this context should actually mean?

## 5 – Lessons from an international perspective

*“Other countries, whose commitment to judicial independence cannot be doubted, have in place mechanisms for achieving some degree of routine accountability for judicial power.”<sup>150</sup>*

**Professor Andrew Le Sueur**

*“I do not think that it is acceptable to have a Supreme Court that has Baroness Hale as the only woman on it and no one from a visible ethnic minority. We are shamed by a picture of our Supreme Court when placed against the [international] equivalents.”<sup>151</sup>*

**Roger Smith**

Director of JUSTICE

The increased constitutional and political salience of judicial appointments is an issue that is far from unique to the UK. In their multi-jurisdictional comparative study, Malleon and Russell chart the global expansion of the judicial role, identifying the process of judicialisation that has led to a current international ‘age of judicial power’.<sup>152</sup> At the core of this trend is the fact that, increasingly, “judges in top review courts are reaching decisions that often have far-reaching social and political implications”.<sup>153</sup> This expansion of judicial power has, unsurprisingly, been mirrored by an increased focus on the process of judicial appointments which has given rise to substantive reforms in many countries.

In reviewing the role of the judiciary and the mechanisms for their appointment in the 19 jurisdictions covered by the study,

150 A Le Sueur, ‘Developing mechanisms for judicial accountability in the UK’, *Legal Studies*, Volume 24, Issue 1-2, 2004

151 Evidence before the Constitution Committee, Autumn 2011

152 K Malleon and P Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world*, University of Toronto Press, 2006

153 Ibid; Introduction

Malleson identifies two overarching international themes. The first is the resulting pressure to rethink the balance between judicial independence and accountability in judicial appointments processes. The second is the growing recognition of the importance of selecting more diverse judiciaries.<sup>154</sup>

What becomes very clear from a comparative analysis is that – in relation to both of these core themes – the UK is in danger of being left behind. Where other countries have moved to introduce accountability mechanisms to the appointment process for their most senior judges, the procedure under CRA 2005 is “the least accountable” in the common law world, with “no elected politicians in its membership and no devices to enhance accountability”.<sup>155</sup> Similarly, the potential consequences of the glaring diversity deficit identified by Smith above (outlined in detail at figure 5) have been explicitly recognised by Lady Justice Arden:

“There is a real possibility that the continued failure of the system to increase judicial diversity will weaken our international standing among the leading judiciaries of the world, which now have significant numbers of women judges at the higher levels and in leadership positions.”<sup>156</sup>

## International lessons on accountability

### *The US model: the elephant in the courtroom*

Unquestionably the most famous (or infamous) example of an accountability measure in relation to judicial appointments is the process of Senate confirmation hearings for appointments to the US Supreme Court. However, in a debate that is otherwise generally characterised by its nuanced sophistication, there is a marked tendency in the UK to reductively conflate any consideration of an increase in accountability in judicial appointments with this process (and its perceived flaws). Time and again, the spectre of ‘what happens in America’ is raised almost as if this, in and of itself, is enough to effectively rebut the whole argument for the need for greater accountability in relation to senior judicial posts.

Thus, for Lord Neuberger, the suggestion of any involvement of elected politicians in the appointments process is met with the

154 *Ibid*; Introduction

155 *Ibid*; Conclusion

156 Lady Justice Arden, written evidence to the Constitution Committee, Autumn 2011

response that:

“Once you start muddying the water and involving the legislature in the appointment of judges, you risk going down a slippery slope, not quite knowing where it will end. The last thing that we want is the sort of thing you see in the United States.”<sup>157</sup>

For Lord Kerr, the suggestion elicits a very similar response:

“I would regard that as a most unwelcome...It is widely acknowledged, for instance, among many commentators that the system of confirmation hearings in America is a most unhappy one.”<sup>158</sup>

Again, for Baroness Prashar:

“I think to put selected candidates before parliamentary scrutiny—well, we know what happens in America. It will be a toxic mixture.”<sup>159</sup>

Despite a lack of consensus as to *why* it is deemed such an undesirable parallel – consistently attacked both for being invasive of a candidate’s privacy (largely a myth based on two particular hearings) and yet also for being so anodyne as to be ‘redundant’ (another myth)<sup>160</sup> – this American ‘bogeyman’ looms disproportionately large over the whole debate. However, it is in fact an almost entirely inappropriate point of comparison.<sup>161</sup>

US Supreme Court judges are chosen *directly by the President* - an explicit and hugely significant act of political patronage operating at the highest level, frequently driven by ideological considerations. It is *this* that leads to the basic constitutional necessity that the Senate hearings scrutinising such appointments are themselves politicised: they are an important check on an overtly political (or, more accurately, ‘Political with a large P’) act. To attempt therefore to divorce this process from its very specific constitutional and political context and apply lessons derived from it to a markedly different system of judicial appointments is misconceived. Instead,

157 Evidence before the Constitution Committee, Autumn 2011

158 Evidence before the Constitution Committee, Autumn 2011

159 Evidence before the Constitution Committee, Autumn 2011

160 The wealth of material produced to the Senate Judiciary Committee and the wider world on candidates and their track record far outstrips what is available to the UK public about any appointees to our Supreme Court.

161 There also appears to be very little recognition or consideration of the fact that pre-appointment parliamentary hearings are now successfully held in relation to a large number of senior public office positions in the UK.

as Graham Gee points out:

*“The critical point is that hearings do not, in and of themselves, ‘politicize’ judicial appointments. It follows that little weight should be attached to arguments in UK debates that appeal to hearings for the US Supreme Court as evidence that scrutiny hearings necessarily ‘politicize’ appointments.”<sup>162</sup> [emphasis added]*

If a mature debate is to be had about the need to enhance judicial accountability without undermining judicial independence, the deeply reductive tendency to effectively equate the former with ‘what happens in America’ must be eschewed in favour of a more considered and broadly informed discussion.

### *Canada: the use of post-nomination, introductory parliamentary hearings*

At around the same time as the reforms under CRA 2005 were being considered in the UK, Canada was also grappling with the issue of the appropriate appointments process for its highest court. Faced with a similar expansion of judicial power vis-a-vis the other branches of government, it was recognised that reform was necessary to enhance judicial accountability while also protecting judicial independence by lessening the scope of political patronage.

Perhaps unsurprisingly, one of the obvious starting points in the discussion was again the model provided by its near neighbour. Thus, while considering what process should be adopted, the Canadian Bar Association noted that:

*“the U.S. style confirmation process draws the harshest criticism in Canada. At confirmation hearings in the U.S., potential judicial candidates can be subject to an “intensive grilling” by the Senate Judiciary Committee concerning their views on current social and political questions. The Senators’ prying into the candidates’ private lives can amount to a virtual inquisition, especially if the political complexion of the committee differs from that of the candidate.”<sup>163</sup>*

<sup>162</sup> Written evidence to Constitution Committee

<sup>163</sup> Canadian Bar Association, ‘Supreme Court of Canada Appointment Process’, [www.cba.org/cba/submissions/pdf/04-10-03-eng.pdf](http://www.cba.org/cba/submissions/pdf/04-10-03-eng.pdf), March 2004 (last accessed 16 March 2012)

However, rather than treating this as somehow an end to the matter, the specific constitutional and political context of US hearings was recognised and an attempt to learn from this was made. The result is that for the appointment of Justice Rothstein in 2006 and the recent appointments of Justices Moldaver and Karakatsanis in 2011, a very different form of Parliamentary hearing has been used in Canada and may now be considered part of the constitutional framework for appointments to their Supreme Court.

In Canada, a shortlist of three nominees for each Supreme Court vacancy is selected by an ad hoc appointing commission (comprising members from all the major political parties) and provided to the Prime Minister and the Minister of Justice, who will then select and appoint a single nominee from this list. It is only after the nominee for any vacancy has been selected by the Prime Minister that the Parliamentary hearing will take place. Thus, while the Prime Minister may conceivably choose to take into account what happens at this hearing before confirming the appointment, it is his or her decision that is fully binding. In effect, therefore, the role of the Parliamentary hearing is not to actually alter the nomination itself (there is no formal recommendation or confirmation process) but instead:

“is intended to bring greater openness and transparency to the appointments process by allowing Canadians to learn more about those individuals who will be appointed to the Supreme Court of Canada.”<sup>164</sup>

Importantly, the hearings take place following clear guidance as to what questions are appropriate (and inappropriate) to ask of a Supreme Court nominee in specific light of the need to preserve judicial independence. The hearings begin with an introductory statement from a constitutional expert outlining the purpose of the process and the necessary restrictions on judicial speech. In particular, it is emphasised that the nominees will not be able to answer questions relating to how they might resolve a hypothetical case or what their position is in relation to a specific sensitive issue that may in future arise before them in court.

Beyond this, the members of the ad hoc Parliamentary committee (composed of MPs – often those possessing significant legal experience – drawn from the respective parties in accordance with their electoral standing) are free to ask a wide range of questions. Topics have included extensive discussions of a nominee’s career

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164 Transcript of 2011 hearing: [www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32665.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html)

background and experience and the qualities that qualify them for the job, the judicial function generally and the specific role of a Supreme Court Justice, a candidate's broad judicial philosophy and their ideas on legitimate legal reasoning, the role of the judicial branch in relation to the other limbs of state and the perceived ideal characteristics of a Supreme Court judge.

The general consensus is that these hearings have been highly successful.<sup>165</sup> Even a brief scrutiny of the transcripts<sup>166</sup> of these hearings shows that – while no doubt still challenging for the nominees – they have been carried out with the utmost “civility and moderation”.<sup>167</sup> The guidance on appropriate judicial speech has been universally respected and on the few occasions that policy issues did arise (in relation to inner city crime rates for example), the nominee straightforwardly (and entirely uncontroversially) indicated that this was a political issue on which it would not be appropriate for them to comment.

The rationale for the use of public (televised) hearings therefore is not to attack or interrogate the nominee from a politically motivated stand-point, not least because the committee involved has no power to block the appointment. Instead, the basis “is really the democratic notion that important decisions should be transparent”.<sup>168</sup> Thus, as the newly appointed Justice Karakatsanis puts it herself:

“I would not be entirely honest if I did not admit to some considerable nervousness about this hearing. However, while it may be somewhat nerve-racking for the nominee, this hearing provides some transparency to the process, and it is a real opportunity for elected officials and the Canadian public to meet the nominees for these important positions.”<sup>169</sup>

The Canadian example thus provides clear evidence that, leaving the long shadow cast by the US model behind, public hearings – if handled well – “do not automatically undermine judicial independence, invade candidates’ privacy, or deter good

165 See for example K Malleon, ‘Parliamentary scrutiny of Supreme Court nominees: a view from the United Kingdom’, *Osgoode Hall Law Journal*, Volume 44, Issue 3, 2006

166 [www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32665.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html)

167 Professor Hogg, constitutional adviser to Canadian Supreme Court, in 2011 hearing transcript

168 P Hogg, ‘Appointment of Thomas A. Cromwell to the Supreme Court of Canada’, Institute of Intergovernmental Relations School of Policy Studies, Queen’s University, SC Working Paper, May 2009

169 2011 hearing transcript

candidates from applying".<sup>170</sup> The result is that the Canadian public are in a position to have a far greater knowledge of those holding very significant public power (and how it is they come to hold that power) than their equivalents in the UK.

### *Israel and South Africa: parliamentary input on Supreme Court nominating panels*

An alternative model pursued in other liberal democracies is that in which "accountability is primarily pursued through the composition of the institution charged with judicial selection".<sup>171</sup> Thus, in both Israel and South Africa, the commission that selects the nominees for the relevant Supreme Court is composed of a combination of parliamentarians (from opposing political parties), judges and other legal professionals.

The specific balance between the different members varies. In Israel, all three branches of government and the legal profession are represented on the nine member committee: in total there are four politicians, three Supreme Court judges and two practising lawyers (elected by the Council of the Bar). In South Africa, a larger panel (consisting of 23 members) is also composed of senior judges, members of the legal profession and – reflecting the unique political context – a larger number of political members (11) drawn from across the political spectrum.<sup>172</sup>

The key point, however, is that by combining parliamentarians and senior judicial / legal figures on the selection committee, this "preclud[es] its decision-making powers from being the exclusive domain of either political or professional interests".<sup>173</sup> The make-up of the committee itself is intended to strike a balance that enhances judicial accountability without compromising judicial independence. Furthermore, as François du Bois indicates with specific reference to South Africa:

"ensuring that appointments are the product of collective

170 K Malleon, 'Parliamentary scrutiny of Supreme Court nominees: a view from the United Kingdom', *Osgoode Hall Law Journal*, Volume 44, Issue 3, 2006

171 F Du Bois, 'Judicial selection in post-Apartheid South Africa', in K Malleon and P Russell eds., *"Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world"*, University of Toronto Press, 2006

172 While recognising the specific cultural context, recent experience might suggest that this large a number and proportion of politicians is perhaps in danger of tipping the balance too far, risking the danger of politicising appointments. This provides further evidence that striking an appropriate balance on such a commission is crucial, as developed in Chapter 6.

173 F Du Bois, 'Judicial selection in post-Apartheid South Africa', in K Malleon and P Russell eds., *'Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world'*, University of Toronto Press, 2006

decision making involving all major interested parties fosters debate among them on the murky conception of judicial merit, and may limit potentially destructive public disagreements between politicians and the legal establishment."<sup>174</sup>

It is therefore apparent that, in the context of enhanced judicial power, the involvement of parliamentarians in an active role in the appointments process does not – if appropriately constructed – necessarily represent a threat to judicial independence and can be important in striking an appropriate balance with that other vital touchstone, judicial accountability. As Lord Justice Etherton notes the Canadian, South African and Israeli examples outlined above are of particular relevance “because they are examples of vibrant democracies and independent judiciaries that confront, when it is necessary, Parliament, the relevant legislature and the executive.”<sup>175</sup> These independent judiciaries are able to perform precisely this crucial role in part because their authority and legitimacy are buttressed by an appointments process that places the public power they wield on a sufficiently firm, democratically acceptable footing.

Thus, as Russell identifies:

“The one clear conclusion to be taken from the [international] accounts of appointing judges...is that no matter how the process is constructed it always has a political dimension....In this age of judicial power, with judges playing such a prominent role in governance, [complete] independence from a country’s politics is neither possible nor desirable.”<sup>176</sup>

## International lessons on diversity

### *Political will and a reconsideration of merit*

In terms of diversity, the essential lesson to be gleaned from other jurisdictions is that, in creating a more representative judiciary, *political will and leadership are key*. This is perhaps most obvious in the South African example outlined above, where the heavy

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174 *ibid*

175 Evidence before the Constitution Committee, Autumn 2011

176 P Russell, ‘Conclusion’ in K Maleson and P Russell (eds.), “Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world”, University of Toronto Press, 2006

cross-party political influence is specifically designed to ensure diversity in a context where it is a particularly pressing element of collective competence. Similarly, in Israel, from “the early days of the [appointing] committee’s work it was the politicians who pushed for a more representative [Supreme] Court”:

“The bottom line, therefore, is that, mainly due to the politicians’ input in the selection process, in comparison to other countries, the composition of the courts in Israel, including the highest court, has always been more heterogeneous from the perspective of ethnic origins, gender, and religious beliefs.”<sup>177</sup>

Similarly, the key to enhancing judicial diversity at the federal level in the US has been exerted, pro-active efforts by the executive from the late 1970s onwards, particularly under presidents Carter and Clinton.<sup>178</sup> The evidence of this political impact has been even more striking in Canada where judicial make-up has been effectively transformed since the 1980s, primarily as a result of “various initiatives on the part of the federal Minister of Justice”.<sup>179</sup> Thus, as Cheryl Thomas outlines in her comprehensive comparative analysis of judicial diversity:

“The direct involvement of senior political leaders in championing the appointment of women and minorities to the bench in both the United States and Canada indicate this is a key element of a successful judicial diversity policy, perhaps especially in common law countries.”<sup>180</sup>

At the core of each of these politically driven judicial diversification processes has been a reassessment (again politically driven) of what ‘merit’ means and where it resides. As outlined above, ‘merit’ is *always* a construct based on the prevailing conceptions of the most suitable attributes for a position and the deemed pool of potential candidates. The reassessment of merit in the context of enhancing judicial diversity generally therefore involves two interrelated processes.

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177 E Salzberger, ‘Judicial appointments and promotions in Israel: constitution, law and politics’, in K Malleon and P Russell (eds.), ‘Appointing Judges in an Age of Judicial Power: critical perspectives from around the world’, University of Toronto Press, 2006

178 C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions: A review of research, policies, and practices’, The Commission for Judicial Appointments, November 2005

179 *ibid*

180 *ibid*

The first is a recognition of the importance of diversity to the collective or institutional merit of the relevant judiciary as a whole and the highest (collegiate) court specifically as a result of the impact on legitimacy in a mature democratic society. The second is the recognition that the prevailing conception of individual merit is not an objective absolute but seriously flawed and exclusionary in and of itself. Thus:

“The evidence from countries such as Canada which have achieved more success in diversifying their judiciaries is that both the cause and effect of their diversification has been the widening of the definition of merit beyond the profile of existing members of the judiciary.”<sup>181</sup>

As Beverley McLachlin identifies when discussing how change was brought about in Canada: “It seems...wrong to permit a limited sector of the profession to exclusively define excellence.”<sup>182</sup>

However, precisely because of the cloning dangers MaLachlin also identifies (the tendency for senior lawyers to ‘look for someone like themselves’), an external – that is political – impetus is required in order to alter this prevailing conception. It will not, almost by definition, come organically from within a body that is able to be largely self-perpetuating.

Thus, in Canada, the Minister of Justice announced a new judicial appointments process which expressly recognised that “the judiciary should represent a broad cross-section of Canadian Society. To achieve this, the appointment of women and individuals from cultural and ethnic minorities should be encouraged”.<sup>183</sup> What has followed has been a pro-active policy of increasing diversity at both the federal and provincial court levels.<sup>184</sup> At the core of this has been a willingness to recognise ‘merit’ in candidates from alternative backgrounds to what McLachlin describes as “the traditional practice and profile – male, silk, an all-round decent chap”:

“In Canada, we have been doing these things for 20 years or more, and there is no sense that merit has suffered

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181 K Maleson, ‘The new judicial appointments commission in England and Wales’, in K Maleson and P Russell (eds.), “Appointing Judges in an Age of Judicial Power: critical perspectives from around the world”, University of Toronto Press, 2006

182 B McLachlin, ‘Why we need women judges’, International Association of Women Judges 8th Biennial Conference, Sydney, 3-7 May, 2006

183 Canadian Minister of Justice quoted in C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions’, 2005

184 C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions’, 2005

or that the bench has declined in quality. The picture is of a mix of bright, dedicated and experienced men and women of varying ages and backgrounds working together to dispense justice as competently, fairly and courteously as they can. Applying the merit principle in this manner requires conscious efforts on the part of both governments and the legal profession."<sup>185</sup>

### *The role and composition of the nominating commission itself*

Another aspect of the process of enhancing judicial diversity in Canada and the United States has been the significant energies devoted by the relevant nominating commissions themselves (at various levels) to outreach programmes. These programmes are specifically designed to encourage applications from members of under-represented groups, both generally and in relation to targeted individual candidates. This allows the nominating commissions in these jurisdictions to retain some of the benefits of the traditional 'tap on the shoulder' mechanism, while avoiding its inherent inequalities by ensuring that encouragement to apply is always followed by a standardised, rigorous evaluation procedure. As such, "these jurisdictions consider active recruitment to be an essential aspect of the work of the commission".<sup>186</sup> As a result, the commissions themselves are able to pursue a joined-up, long-term HR policy (as opposed to always relying on an ad hoc snapshot) that is beneficial to increasing judicial diversity.

The composition of the nominating commission itself in terms of its own reflectiveness of society is also an important point that has been pursued in other jurisdictions (again, notably, in Canada and the US). By encouraging and at times mandating a loosely representative mix on the selection body itself, the potential negative impact of the psychological tendency to recruit in one's own image (as identified by McLachlin) is largely negated. This is also supported by empirical research from America indicating that "diverse commissions attracted more diverse applicants and selected more diverse nominees for appointment".<sup>187</sup>

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185 B McLachlin, 'Why we need women judges', International Association of Women Judges 8th Biennial Conference, Sydney, May 2006

186 C Thomas, 'Judicial diversity in the United Kingdom and other jurisdictions', 2005

187 *ibid*

### *The failure to 'trickle-up'*

Another important lesson – this time drawn particularly from a number of European jurisdictions – is the existence of a well established 'prestige' effect whereby women and ethnic minorities are most likely to attain judicial office in less prestigious courts.<sup>188</sup> This effect is in evidence in the UK where, although there has been some limited progress at lower levels, this has clearly not been the case for the senior judiciary. As Baroness Neuberger puts it:

"if you talk to them [the minority judges in the lower courts] privately they will all talk about being below the salt. They feel as if they are a junior branch where it is okay to be diverse and people make appointments in a different way, but that does not apply further up."<sup>189</sup>

However, the existence of this effect is even more striking in jurisdictions that have made far greater progress towards diversity at lower levels. As Thomas outlines, in the Netherlands, France, Italy, Spain and Germany – all countries where women have had substantial success in gaining appointment to the judiciary – this early success does not translate to progress into senior posts. Thus, even where there is something approaching parity at the lower levels of a judiciary, this does not – if left to itself – lead to the desired 'trickle up' of diversity into senior posts: instead, in these jurisdictions, "every step up the judicial ladder took more time for women than for men".<sup>190</sup>

Notably, however, this prestige effect does not operate in Canada or the United States, where women and minorities are as (and possibly more) likely to become judges on higher courts as they are on lower courts.<sup>191</sup> This emphasises again the importance of political will and leadership in these contexts and that it must operate specifically at the level of the senior judiciary if a diversification of that senior judiciary is to be brought about. An appointments system that removes all substantive political input is therefore problematic not only from an accountability perspective, but also because it removes the single most effective lever for promoting diversity.

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188 Ibid

189 Evidence before the Constitution Committee, Autumn 2011

190 C Thomas, 'Judicial diversity in the United Kingdom and other jurisdictions', 2005

191 Ibid

## ■ 6 - Addressing the democratic deficit

*“This is an issue that concerns all of us in this society as a whole. It cannot be left just to the professions to ensure that we have an appropriate judiciary, fit for the 21st century.”<sup>192</sup>*

**Nwabueze Nwokolo**

Chair of Black Solicitors Network

The preceding chapters have demonstrated the constitutional and societal importance of an appropriate system of senior judicial appointments that is able to provide a fully legitimate basis for the important expanded judicial role in the new constitutional settlement. The key to achieving such a system lies in a sensitive rebalancing of the weight attached to the key touchstones of independence, accountability and diversity. This chapter will seek to address the relationship between the first two and the following chapter will focus on the latter.

### **An expanded, permanent senior judiciary JAC with minority parliamentary representation**

As outlined in detail in Chapter 2, the current appointments process for the senior judiciary – particularly the composition of the relevant appointing commissions – is, as Lord Justice Etherton identifies, “constitutionally inappropriate”.<sup>193</sup> The presence of a predominant senior judicial influence on these panels, reinforced by the system of statutory consultations, has created a situation in which (in both appearance and reality) one branch of government is in danger of effectively becoming a “self-perpetuating oligarchy”.<sup>194</sup>

192 Evidence before the Constitution Committee, Autumn 2011

193 Evidence before the Constitution Committee, Autumn 2011

194 R Stevens, ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’, Legal Studies, Volume 24, Issue 1-2, pp. 1-34, 2003

To address this pressing issue, the membership of the appointing commissions for the senior judiciary should be expanded and altered in a manner that reduces the scope for self-perpetuation and introduces a greater degree of democratic legitimacy.

Rather than a system of ad-hoc panels convened as and when a vacancy arises, a more permanent senior judiciary JAC should be established (in a similar vein to the regional JACs charged with lower level judicial appointments).<sup>195</sup> This body should be responsible for appointments for each of the senior positions identified in Chapter 2: Supreme Court and Court of Appeal judges, the Lord Chief Justice and the Heads of Division. This JAC should be composed of 9 individuals: 3 senior judicial members, 3 parliamentary members and 3 lay members.

### *The judicial membership*

The senior judiciary must retain a significant presence on this commission. As such, both the President and Deputy President of the Supreme Court should be members to continue to offer insight on the role of the highest court. The third judicial member for England and Wales contests should be the Lord Chief Justice who, as head of the judiciary in the jurisdiction and a liaison with the other branches of government, should have a clear role.<sup>196</sup> In relation to Scottish and Northern Irish Supreme Court contests, the third member should be the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland respectively.<sup>197</sup>

In the event that one of these judicial members is disqualified (which should include whenever they would be appointing their own successor, they are themselves applying for a post or they have a declared conflict of interests), the Master of the Rolls should be the replacement.<sup>198</sup> If two of the judicial members are disqualified (or one member and the Master of the Rolls) then an alternative member of the senior judiciary (as defined in CRA 2005) should be selected by the relevant lay chair (see below).

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195 The particular benefits of a permanent body are discussed in the following section on addressing the diversity deficit.

196 It is important to stress that these recommendations should be taken as a package. It would, for example, be highly undesirable to add to the number of senior judicial members on the appointing panel without making the broader move to the significantly larger and diversified commission suggested.

197 In the event of a mixed contest the Lord Chief Justice should sit on the panel as the representative of the jurisdiction from which most applicants will come.

198 Unless it is the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland who is disqualified, in which case the replacement should be the Lord Justice Clerk or the senior Lord Justice of the NI Court of Appeal respectively.

### *The parliamentary membership*

The three parliamentarians on the commission should be drawn one from each of the three largest Westminster parties. The choice of these members would be at the discretion of the parties themselves. However, to ensure an important degree of relevant expertise, it could be stipulated that these members should be selected from the House of Commons Justice Committee (which would have the accountability benefit of a guaranteed direct connection to the electorate) or from either that committee or the House of Lords Constitution Committee. This could also be extended to allow the selection of retired Lord Chancellors still sitting as parliamentarians.

In the context of the constitutional implications of devolution it is also important to ensure significant input from both Scotland and Northern Ireland for appointments to the UK Supreme Court. As such, while the process of consultation with the senior judiciary on the merit of every Supreme Court candidate should be removed (as discussed below), consultation with the First Minister of Scotland (and also of Wales) and an appropriate non-judicial Northern Ireland consultee should be retained and given greater emphasis as an important aspect of the process. This could be augmented by introducing a consultation requirement with the chair of the relevant devolved parliamentary committees in both Scotland and Northern Ireland (of particular relevance for the appointment of justices with the required experience in those jurisdictions).

### *The lay membership*

One lay member should be drawn from each of the three regional JACs. One of these lay members should always chair the panel for any given appointment. For Supreme Court appointments that relate exclusively to one jurisdiction, the relevant lay member for that jurisdiction should chair. In the event of a mixed jurisdiction Supreme Court contest, the lay member from the England and Wales JAC should chair as the representative of the jurisdiction from which most applicants will come. For the other senior judicial posts, the chair should be the lay representative of the England and Wales JAC.<sup>199</sup>

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199 An objection could conceivably be raised to the involvement of the Scottish and Northern Irish lay representatives in the selection of the senior posts carrying specific relevance to England and Wales. However, the presence of these members, contributing expertise in the assessment of judicial quality while further removed from the posts in question would in fact be a positive. The alternative would be to have the lay membership for these posts drawn exclusively from the England and Wales JAC.

The lay members on the panel should be selected in a transparent manner, preferably by a vote among the members of the respective regional JACs. Lay members should be rotated on a staggered three year basis which can be phased in once the commission is up and running (i.e. a member from a different regional JAC will be replaced annually after serving a three year term). In relation to this lay membership, the important role of relevant academics as a bridge between the different ‘camps’ within such a proposed panel should be emphasised – although strictly lay, they will carry expertise that is relevant to both the judicial and the political aspect of the process.

### *An appropriately balanced appointing panel<sup>200</sup>*

The key point about a panel balanced in this way is that no single section of interests should be able to dominate. The parliamentarians provide the much needed connection to the democratic process and therefore enhanced legitimacy for the candidate ultimately appointed. However, the political input remains very firmly a minority one, thus precluding any possibility of an over ‘politicisation’ of appointments. The presence of cross-party members (with relevant expertise) also reinforces this.

The presence of three senior judicial members on the panel preserves the important ability to harness invaluable judicial expertise concerning the roles in question. It also enables a greater contribution from the Lord Chief Justice who is particularly well placed to contribute to the process. However, senior judicial input would also be reduced to a clear minority role in the appointment of the senior judiciary. As such, this branch of government would no longer be open to the charge of unaccountable self-perpetuation (with the resulting impact on legitimacy). This would be further reinforced by the phasing out of senior judicial consultations for Supreme Court appointments (discussed in detail below in relation to the significant diversity implications).

Along with individual expertise and broader perspectives, the lay membership on the panel provides an important symbolic representation of the interests of the general public in how their judges are selected. It also serves to further balance and act as arbiter between the professional and political interests in judicial appointments (as does the lay chairmanship). As an equal partner buffering these interests, the lay role in the process would also

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200 The diversity requirement of a gender and ethnicity mix on the panel is discussed in the following chapter.

be enhanced with the freedom from the disproportionate judicial influence that exists in the current system.

### Retaining the Lord Chancellor's veto

One suggestion contained in the Ministry of Justice consultation seemingly designed to increase accountability in judicial appointments is for the Lord Chancellor to become a contributing member of the ad hoc appointing commission for certain senior judicial posts *in exchange for losing his limited veto power*.<sup>201</sup> This suggestion is in fact flawed – rather than enhancing democratic accountability, it risks reducing it at the expense of further judicial influence.

At present, despite the predominating judicial impact on selection, the Lord Chancellor holds the power to block (if only once) the name put to him as a result of this judge-led process. This is a real and meaningful executive power, regardless of apparent concerns over the publicity implications of exercising it. Indeed, precisely because of these publicity implications, the power retains a significant 'message-sending' capacity that acts as an important latent check in the senior judicial appointments process.

If the Lord Chancellor were to relinquish this veto power, this important (and effectively singular) counterpoint to judicial influence over the process would be removed. Although he may be in a position to then put his views on individual candidates into the collective mix, there is no guarantee these will be heeded. Indeed, the proposed composition of the resulting ad-hoc panel explicitly contains the possibility that such a panel, while including the Lord Chancellor, would have a judicial majority. This is before the impact on the remainder of the panel of the feeding in of the views of up to another 18 senior judges is even felt.

It is very important to remember that we are talking about a constitutional *system*, as distinct from the individuals involved. The present Lord Chancellor may feel that he can personally have greater sway by contributing his views on the commission. What happens, however, if it is a less established or well respected Lord Chancellor with a poorer relationship with the senior judiciary? Removing the executive end stop opens up the clear possibility of a senior judicial appointment being made largely at the unchallenged discretion and behest of members of the judiciary. This is both inappropriate and undesirable in a mature democracy, not least for the legitimacy and long term health of the judicial branch itself.

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201 MOJ consultation paper, 'Appointments and Diversity: A Judiciary for the 21st Century', 2011

The Lord Chancellor should therefore retain the current limited veto power and thus the role as “the guardian of the process with a long-stop responsibility”.<sup>202</sup> This should be in addition to the move towards the senior judiciary JAC (with minority parliamentary representation) outlined above. In doing so, the process would rightly involve all three branches of government in senior judicial appointments without affording a disproportionate role to any. This reflects the recognition that:

“In a democratic society, the elected legislature, and those legislators who serve in the executive under the system of responsible government, need to be involved in the selection of the judiciary in more than a tangential way, if only to protect the judiciary from political attack.”<sup>203</sup>

### Post-appointment introductory parliamentary hearings

The Canadian experience in recent years has illustrated that introductory parliamentary hearings for Supreme Court nominees can enhance judicial accountability in the context of increased judicial power by providing greater transparency and public awareness. Equally importantly, it has shown that - in marked contrast to the intrinsically and deliberately politicised process in the US – such hearings, if carefully managed, do not necessarily undermine judicial independence.

The distinction lies heavily in the nature and structure of the hearing in question. Full pre-appointment parliamentary scrutiny of candidates or nominees in which the relevant committee has a veto or a formal recommending power is perhaps inevitably politically loaded. In Canada, however, much of the sting is drawn precisely because the purpose of the hearing is not to alter the actual nomination. Rather, it is to enhance the legitimacy of the nominee through exposure to elected representatives and by ensuring that the Canadian public is informed about those wielding significant power in their society (and the process by which they come to do so).

In the context of seeking a constitutionally appropriate balance in judicial appointments, the introduction of full pre-appointment

202 Lord Falconer, evidence before the Constitution Committee, Autumn 2011

203 R Stevens, ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’, *Legal Studies*, Volume 24, Issue 1-2, pp. 1-34, 2003

confirmation hearings in the UK would – while certainly enhancing accountability – carry the risk of overtly politicising the appointments process, thus swinging the pendulum back too far to the detriment of judicial independence.

This should not, however, be the end of the matter. Instead, a process of *post-appointment* introductory parliamentary hearings should be developed for Supreme Court appointments, mirroring the Canadian rationale.<sup>204</sup> The hearing should be held before a joint sitting of the Justice Committee in the House of Commons and the Constitution Committee in the House of Lords, thus providing both expertise and elected legitimacy. As in Canada, clear guidelines would need to be drafted as to the conduct of the hearings and the appropriate limits of judicial speech (including the inability of an appointee to answer questions about specific issues on which they may be required to adjudicate).<sup>205</sup>

The often knee-jerk dismissal of proposals for any form of parliamentary hearing in the UK is generally based on variations of the same two questions (largely left hanging without any attempt to pursue them): ‘what could you legitimately ask?’ (or more bluntly, ‘what would be the point?’) and ‘how can you possibly restrain parliamentarians from asking what they shouldn’t?’. Thus, Lady Justice Hallett with regard to the former: “I cannot think of any question that they could legitimately ask”<sup>206</sup>; and Lord Irvine with the latter: “there would just be no way in which you could restrain politicians in such a process from asking [inappropriate] questions; they would not be able to resist the temptation”.<sup>207</sup>

Even a cursory examination of the Canadian precedent reveals the limitations of these objections. The guidelines on appropriate judicial speech have been universally respected by the parliamentarians involved and the hearings, while no doubt challenging for the nominees, have been carried out with the utmost “civility and moderation”.<sup>208</sup> Is there really so little faith in their British equivalents

204 Such a hearing would potentially also be relevant for the position of the Lord Chief Justice given the political and administrative significance of this role. A precedent for post-appointment hearings in the UK can be found in relation to the Monetary Policy Committee of the Bank of England.

205 These guidelines could build on the existing Liaison Committee guidelines used in the pre-appointment hearings mandated for other senior public office positions.

206 Evidence before the Constitution Committee, Autumn 2011. See also Goldring (to Constitution Committee): “I cannot see what meaningful discussion you can have without asking the sorts of questions that immediately would result in independence being attacked, making it impossible for a judge to try a particular sort of case.”

207 Evidence before the Constitution Committee, Autumn 2011

208 Professor Hogg, constitutional adviser to Canadian Supreme Court, in 2011 hearing transcript: [http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc\\_32665.html](http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32665.html)

to do the same? The evidence from the UCL Constitution Unit review of pre-appointment parliamentary hearings for various senior public office positions suggests that this is unjustified - "intrusive questioning...is unknown: Select Committees have followed the Liaison Committee guidelines on proper lines of questioning".<sup>209</sup> Furthermore, beyond the necessary restrictions, Canadian Supreme Court nominees have answered informatively on a broad range of topics (as outlined in Chapter 5), from the qualities that qualify them for the post to the broad relationship between the judiciary and the other branches of state. The result is that the Canadian public are in a position to know far more about those exercising public power in their society than their equivalents in the UK.

Indeed, there is also a significant irony in the two objections quoted above. Both Irvine and Hallett (and others expressing similar views throughout the Constitution Committee review) are effectively querying the ability of UK parliamentarians to ask pertinent, challenging and yet appropriate questions relating to the judicial function while simultaneously taking part in a parliamentary process that is doing precisely this. It is tempting to say that the inability to recognise this stems again from the looming spectre of the American 'bogeyman' – a very different type of hearing than that advocated here.

The introduction of post-appointment parliamentary hearings would serve to increase both accountability and legitimacy – as it has in Canada - without posing a threat to judicial independence precisely because:

"The purpose of this form of scrutiny . . . is to promote a form of dialogue between people's representatives and appointed judges about major legal developments, to help the governed understand what is happening and why; and to provide an opportunity to the governors to explain and justify."<sup>210</sup>

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209 Hazell and Malleon written evidence to Constitution Committee

210 Keith Ewing, quoted in A Le Sueur, 'Developing mechanisms for judicial accountability in the UK', *Legal Studies*, Volume 24, Issue 1-2, 2004

## 7 - Addressing the diversity deficit

*“Merit...directs attention to proven professional achievement as a necessary condition, but also enables account to be taken of wider considerations, including the virtue of gender and ethnic diversity.”<sup>211</sup>*

**Lord Bingham**

Senior Law Lord, 2009

### **A new statutory ‘merit’ test recognising the importance of collective competence in appointments to the Supreme Court**

As outlined in Chapter 4, the proposed introduction of the s159 ‘tie-break’ provision will do little to address the diversity deficit that is now having a “corrosive impact...on the legitimacy of the judiciary”<sup>212</sup>. The key to enhancing diversity lies in a reassessment of the prevailing construction of ‘merit’ in senior judicial appointments. In relation to the Supreme Court specifically, it lies in the recognition that ‘merit’ must relate directly to what that court needs as a collective to be competent *as a collective*. This collective competence directly involves diversity in the same way that it requires an appropriate range of specialist legal experience.

At present, CRA 2005 simply requires candidates to the Supreme Court to be appointed ‘on merit’, without laying out any explanation of what this means. Thus, for Lord Bingham, as the opening quote shows, the ‘wider considerations’ of gender and diversity were in

211 T Bingham, ‘The Law Lords: who has served’, in L Blom-Cooper, B Dickson and G Drewry (eds), “The Judicial House of Lords 1876-2009”, 2009, p. 126.

212 K Malleson, ‘The New Judicial Appointments Commission in England and Wales’ in K Malleson and P Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the world*, University of Toronto Press, 2006

fact components of merit. However, as outlined above, this is now far from the prevailing conception. Indeed, there is a real sense in which ‘merit’ has been hijacked by a very specific (male orientated) understanding of individual ‘excellence’ that has achieved a near mythic status. Thus, for Bingham’s successor, Lord Phillips, ‘merit’ in relation to Supreme Court appointments does not even strictly allow the appointing commission to “have regard to the composition of the court and any gaps of specialities on the court.”<sup>213</sup>

One solution, given the silence of the Act, would be for the Lord Chancellor to issue guidance (under section 27(9) CRA 2005) that the broader understanding of merit emphasising the collective needs of the institution should be applied in Supreme Court appointments. However, so entrenched is the ‘top-10’ or ‘league table’ obsession identified by Lord Falconer<sup>214</sup> that it would be clearer and cleaner to put such a reformulation on a statutory footing.

Although somewhat ambivalent on the matter, Lord Phillips has suggested<sup>215</sup> one such amended statutory test that would, with one minor addition for emphasis (identified in italics), serve as an appropriate reformulation of ‘merit’ in Supreme Court appointments:

The commission must select that candidate who will best meet the needs of the court, having regard to the judicial qualities required of the Supreme Court Justice, the current composition of the court *and the diverse composition of the society it serves.*

Under this, it would be possible to ensure that a court in which “public law now occupies about half of the time”<sup>216</sup> has sufficient public law expertise. It would also be possible to ensure that the delivery of justice in society is informed by the broad range of experiences and perspectives that contribute to that society. To ensure, in short, a collective court that is fit for purpose.

### **Composition of the appointing commission and the phasing out of judicial consultations**

As suggested above, the move towards a permanent senior judiciary JAC with a minority parliamentary representation should be accompanied by an end to the process of statutory consultations

<sup>213</sup> Evidence before the Constitution Committee, Autumn 2011

<sup>214</sup> Evidence before the Constitution Committee, Autumn 2011

<sup>215</sup> Evidence before the Constitution Committee, Autumn 2011

<sup>216</sup> Lord Phillips, Evidence before the Constitution Committee, Autumn 2011

on Supreme Court appointments with the senior judiciary. As identified in Chapter 2, these consultations are problematic from an accountability perspective as they increase the potential for judicial self-perpetuation. However, they are even more so from a diversity standpoint.

To illustrate this, it is worth focusing on the most recent Supreme Court appointments process from 2011 (in which two justices were appointed – one sixth of the court’s full composition). The five member ad-hoc appointing commission was all male (and all white).<sup>217</sup> Consultations would then have been undertaken with the remaining nine members of the Supreme Court (eight white men, one white woman)<sup>218</sup>; the other defined members of the senior judiciary who were not themselves applying for the posts (up to eight white men) and the required political figures (three white men).<sup>219</sup> In total, therefore, the major input as to the merits of each and every candidate came from up to 24 white men and one white woman. It is worth reiterating here the comment from the Chief Justice of the Canadian Supreme Court:

“Psychologists tell us that human beings have a tendency to see merit only in those who exhibit the same qualities that they possess....So when they look for merit, they tend to look for someone like themselves.”<sup>220</sup>

If this was the HR procedure for a post in a private company or organisation of any kind, it would be considered untenable. Instead it was the most recent appointment process for the body at the apex of one branch of government in the UK.<sup>221</sup>

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217 Phillips, Hope, Stephens, Russell and Coghlin

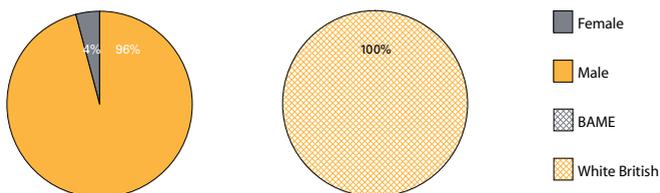
218 The death of Lord Roger led to one of the vacancies.

219 These figures reflect the fact that the Northern Irish consultee is now in practice the Chief Justice of Northern Ireland.

220 Beverley McLachlin, ‘Why we need women judges’, International Association of Women Judges 8th Biennial Conference, Sydney, May 2006

221 It is again important to stress that the criticism here is purely of the system and not the undoubted high calibre individuals both contributing to and appointed under this system.

### *Individuals potentially providing input into the most recent Supreme Court appointments process*



This situation needs to be addressed. First, the proposed senior judicial JAC (or indeed any senior judiciary appointing commission) should have a clear diversity and ethnicity mix. This would come largely from the politicians and lay members on the panel and could be driven by legislative provision or guidance from the Lord Chancellor. As outlined above, this is a policy already pursued in other jurisdictions with positive records on enhancing diversity.

Secondly, the judicial element of the consultation process should be phased out and replaced by a thorough system of appraisal (the political consultations retain an important role in relation to diversity as discussed above). Indeed, as Lord Powell points out “it is a bit absurd” that a system of appraisal relevant to senior judicial appointments is not already in place. Furthermore, this would also reduce the scope for unresolved conflicts of interest in the process of appointments to the Supreme Court (as outlined in Chapter 2).

It may be that the removal of judicial consultations will lead to the loss of some valuable contributions on a particular candidate’s quality but this can be compensated for from the appraisal process, from having the Lord Chief Justice on the appointing panel and from an expanded work product assessment element in the appointment procedure.<sup>222</sup> With this, the inherent inequalities in the process from a diversity perspective (and the corresponding legitimacy implications) can be addressed.

<sup>222</sup> The current Supreme Court appointment procedure involves inviting candidates to submit three examples of their work product from which their legal abilities can be assessed.

## Continuing to provide only one name to the Lord Chancellor

The main lesson on diversity from an international perspective is that, in creating a more representative judiciary, political will and leadership are key. In keeping with the basic laws of physics, it would appear that nothing ‘trickles-up’ without a substantial push.

As such, one suggestion that has been made is that the Supreme Court appointing commission (and potentially those for other senior judicial posts) should provide three names to the Lord Chancellor rather than one (with the possibility that the list must contain one female or BAME candidate).<sup>223</sup> The value of this is that it could use the lever of political direction to enhance diversity.

This mechanism has significant potential advantages (in terms of accountability as well as diversity). However, in the contemporary constitutional settlement (as outlined in Chapter 1), it is ultimately not our preferred option in light of the delicate balance required between the three touchstones for judicial appointments.<sup>224</sup> A central aspect of the expanded judicial role is the protection of individual and minority rights through, when necessary and legitimate, a robust challenge to executive power. The ability to do this is predicated on a significant degree of independence from that executive that could be challenged (*or be seen to be* challenged) by a return to executive discretion in senior judicial appointments.

As Lord Falconer puts it:

“The role of the judges in our society has become much more important. They defend our rights in a much more meaningful way than previously. If you look at the way in which politicians have behaved in the past 10 years, the Prime Minister and the Home Secretary when I was Lord Chancellor sought political advantage from attacking the judges. The current Prime Minister and the current Home Secretary have done precisely the same. The idea that a member of the Prime Minister’s Cabinet, who is appointable and fireable by the Prime Minister, should be the person

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223 See for example Malleon and Hazell written evidence to the Constitution Committee, Autumn 2011.

224 It is important to again note that this is the case in the context of the full package of proposed measures. If the reformulation of the merit test (along with the political input on the appointing commission to drive the application of this test) is not accepted, the diversity (and accountability) benefits of greater executive involvement may become a more appealing alternative.

who appoints the people that the Prime Minister and Home Secretary are [attacking ]... [is ]unthinkable.”<sup>225</sup>

While ‘unthinkable’ is unfair, it is perhaps undesirable. It is important again to focus on the *system* rather than the individual. It is unquestioned that the present Lord Chancellor and his recent predecessors (all well established figures with significant legal expertise and respect within the judiciary) would not allow and have not allowed political considerations to enter into senior judicial appointments. However, there is no guarantee that future incumbents will be similar figures with similar minds or that they will even be lawyers (given the weakening link between the legal profession and parliament). From a systemic perspective therefore it is preferable to utilize alternative forms of political leadership and will to drive the diversification of senior judicial appointments.

### **A politically driven, long term HR approach to senior judicial appointments**

The first aspect of political leadership would be the reformulated statutory test for appointments to the Supreme Court. This would operate hand in hand with the proposed senior judiciary JAC which, with a minority parliamentary membership (and subject to a retained executive veto), balances the interests of all three branches of government without lending disproportionate sway to any.

The political members of this commission would be in a position to drive the application of the broader understanding of merit, emphasising its impact on collective competence and therefore its important role as a factor in the appointments process. This would perhaps particularly involve an emphasis on the possibility of appointing to the highest court members from a wider range of career backgrounds (as explicitly mandated by parliament under CRA 2005) in line with the approach taken in senior courts in other jurisdictions.

This role should be supported by “real, persistent leadership”<sup>226</sup> from the Lord Chancellor as “a more active champion of diversity”<sup>227</sup>. This should involve giving guidance to the political members of the panel to perform the function identified and more formal guidance (under the statutory provision) to the full commission as deemed necessary. Thus, without the complication of executive discretion,

225 Evidence before the Constitution Committee, Autumn 2011

226 Lord Falconer, Evidence before the Constitution Committee, Autumn 2011

227 Lord Powell, Constitution Committee evidence

the Lord Chancellor can and should, as the ‘guardian of the process’, be responsible for holding the appointing commission to account on diversity (a role that could be emphasised by taking up Baroness Neuberger’s suggestion that he also chair the Judicial Diversity Taskforce<sup>228</sup>).

A further area in which the Lord Chancellor could provide useful guidance is interconnected with the benefit of moving away from ad hoc appointing panels towards a more enduring senior judiciary JAC. Under the pre-CRA 2005 system, one of the advantages was the potential for the so called ‘tap on the under-represented shoulder’ whereby promising non-traditional candidates could be identified as part of a long term HR strategy, monitored, and subsequently given direct encouragement to apply.

In direct contrast, a fundamental problem with the current system of ad hoc panels for senior appointments is that they are, by definition, concerned purely with a snap-shot picture rather than a long term view and are characterised by no consistency of membership or approach. A significant advantage of establishing a permanent senior judiciary JAC (as with the present regional JACs for lower courts) is that it could remedy this. With prompting from the Lord Chancellor, this body could pursue a more joined up approach to enhancing judicial diversity at senior levels by actively engaging in outreach activities. This approach mirrors that in jurisdictions with positive records on enhancing judicial diversity (notably Canada and the US) which “consider active recruitment to be an essential aspect of the work of the commission”.<sup>229</sup> As such, the benefits of the old system could be combined with the advantages of the new in the pursuit of an appropriately diverse, independent and accountable senior judiciary.<sup>230</sup>

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228 Evidence before the Constitution Committee, Autumn 2011

229 C Thomas, ‘Judicial diversity in the United Kingdom and other jurisdictions: A review of research, policies, and practices’, The Commission for Judicial Appointments, November 2005

230 A more enduring senior judiciary JAC would also be well placed to monitor and react to the longer-term needs of the Supreme Court in relation to the broader issues of succession planning. Between the 2009 move across Parliament Square and 2013, the Supreme Court will have lost and replaced over half of its membership due to largely mandatory retirement of justices at 70. With this age limit set to remain fixed, a the senior judiciary JAC would have the advantage of being able to plan ahead and recognise any need to advance individuals into the Court of Appeal and Supreme Court at a younger age to prevent disruptions caused by excessive turnover.