

Judges, Power and Accountability

Constitutional Implications of Judicial Selection

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There are two aspects to judicial selection, both of which have constitutional implications: first and foremost is the selection of people to be appointed judges, but second is the selection of judges to hear particular cases, especially in appellate courts which, like those in the United Kingdom, do not sit *en banc*.

Selecting people to be judges

I am fond of quoting Erika Rackley's aphorism, 'Once we accept that who the judge is matters, then it matters who our judges are.'¹ Neat, but what on earth does she mean? I think that what she means is that, in our common law world, we cannot and do not pretend that the law is a clear and simple set of rules which can be readily applied to a given set of facts. The common law consists of a set of principles derived from analysing and then synthesising the answers given by the judges in a multitude of individual cases. Some of these are clear and constant enough to be called rules, but many are not. This means that the answer to any new set of facts has to be thought through and explained by reference to the principles to be derived from the decided cases. Not for us is the continental theory that the law is the law and that is that. Not for us is the continental style of judgment, where the answer is derived from a series of propositions, each beginning 'whereas . . .' I over-simplify of course.

But if the law (let alone the facts) is contestable, then we have to accept that views may legitimately differ about the answer to many legal cases. Any case coming before the Supreme

¹ *Women, Judging and the Judiciary*, Routledge, 2013, winner of the Society of Legal Scholars' Peter Birks prize for the best academic law book published that year.

Court of the United Kingdom by definition involves an arguable point of law of general public importance, because that is the criterion for giving permission for it to come to us. And it is comparatively rare for all the judges who have heard the case to have reached the same conclusion, and even rarer for them to have done so for the same reasons. In the case of *Ivey v Genting Casinos (UK) Ltd*,² about what constitutes cheating at cards, the four judges who have so far expressed an opinion have all given different reasons for their results and it is entirely possible that the Supreme Court will give different reasons again.

So of course it matters who our judges are. But before we think about how they might best be selected, perhaps we should think a little about what sort of a judiciary we want to achieve by our selection processes? Constitutionally, what should be the characteristics of the judiciary in a democratic state? I suggest that the judiciary we want to achieve would possess four main virtues: it would be independent; it would be incorruptible; it would be of high quality; and it would be diverse.

(a) Independence

First is independence. There are several facets to this. We tend to think of judicial independence in terms of independence of government. And of course that is crucial in any democracy. The judges are there to enforce the laws which Parliament and government have made. But they are also there to ensure fair play in disputes between citizen and state and between citizen and citizen. And they are there to ensure that the government and other public authorities, such as the police, obey the law and act within their powers. So any judge must be free to make his or her decisions according to law without fear of adverse consequences from government or Parliament should they not like the decisions reached. But the judge must also have the independence of mind and spirit to do this whether or not there are adverse consequences to be feared.

It is not only the other organs of the state from which the judges must be independent. They must also be independent-minded enough to reach their own decisions according to law, without

² UKSC 2016/0213; on appeal from [2016] EWCA Civ 1093.

thinking of such things as the impact upon their own career progression or even their relations with their colleagues. We should all be able to differ while remaining on good terms. Nor should they be overly afraid of their decisions being over-turned on appeal. No-one can get it right all the time. A first-tier appellate court is there to secure the necessary accountability to the law of the first instance judges.

(b) Incorruptibility

Closely associated with independence is incorruptibility. We need judges who cannot be bought, whether with money or more subtle forms of inducement. Everyone who comes before the courts to have their cases tried must be confident that they will get a fair hearing and a fair decision: ‘to no-one will we sell right or justice’, as Magna Carta says. There are other inequalities that we may have to put up with, such as inequality in legal representation, but we should not have to put up with inequality in the eyes or mind of the judge.

There are other dimensions to the neutrality which comes along with incorruptibility. Judges must not be in thrall to big business, to wealth and influence, to organised labour, to political parties, or to any other interest group. These more insidious pressures are harder to recognise and thus harder to counter. There have always been judges who are instinctively more or less pro-government, more or less pro-employers, more or less pro-landlords, more or less pro-husband and fathers, more or less pro-insurance companies. We need judges who can recognise and counter their own biases, whether conscious or unconscious.

(c) Quality

Then of course comes judicial quality, which encompasses all the competencies listed by the Judicial Appointments Commission as criteria for appointment: such as knowledge of the law and legal processes; skill and intelligence in discovering what you do not know and applying what you know or discover to the case in front of you; industry in applying yourself diligently to the ever-increasing demands of the job; patience, fairness and courtesy in dealing with lawyers and litigants alike; empathy and understanding for people whose lives are very different from your own, for businesses you have never engaged in, for activities you never knew existed.

(d) Diversity

Last, but not least, there is diversity. This is the new kid on the block. While we in the United Kingdom have taken independence, incorruptibility and quality for granted for a long time, possibly in England since the Act of Settlement of 1701, only in this century has diversity been seen as a desirable, even a necessary, characteristic of the judiciary.

Diversity comes in many dimensions, not all of them protected characteristics under the Equality Act 2010. But we do want a judiciary in which women and visible minorities are much better represented than they are at present; here in Northern Ireland, we want both the Unionist and Nationalist communities to be properly represented, and I suspect that there are similar considerations elsewhere in the United Kingdom; ideally, there should be a mix of legal professional backgrounds, so that there are judges at every level with experience, not only of advocacy, but of litigating, of transactional lawyering, of teaching and research, and no doubt much more; and everyone with the requisite ability and personal qualities should be able to feel that the judiciary is open to them, whatever their religion or belief, their sexual orientation, their socio-economic background or origins.

Why should we want all this? There are several reasons. The first is democratic legitimacy. People should be able to feel that the courts of their country are ‘their’ courts, there to serve the whole community, rather than the interests of a narrow and privileged elite. They should not feel that one small section of society is dictating to the rest. These days, we cannot take the respect of the public for granted; it must be and be seen to be earned. Second is fairness and equality. The legal system has long embodied the values of fairness and of equality before the law. ‘The law is the true embodiment of everything that is excellent’, as the Lord Chancellor sang in *Iolanthe*, ‘and I, my Lords, embody the law’. The judges themselves should embody those values of fairness and equality to which the legal system aspires. Third is the effective exploitation of talent, coupled with effective opportunities for talented people to realise their potential. There are many able people in the law who for one reason or another do not see themselves as judges or who have not traditionally been seen by the system as judges but whose talents should be recognised and put to good use.

Finally, and perhaps more controversially, there is the quality of decision-making. I used to be rather sceptical about the idea that women brought something different to the business of judging. We are all lawyers and judges first; we have all sworn the judicial oath; and in most cases, ‘a wise old woman will reach the same decision as her wise old man’.³ But in fact we all bring something different to the business of judging. We bring our experiences of life, our values, our philosophies of judging, our inarticulate major premises, our unconscious biases. As the great Beverley McLachlin, the long-serving Chief Justice of Canada, has put it, ‘we lead women’s lives; we have no choice’. Judging should be informed as much by the experience of leading a woman’s life as it is by the experience of leading a man’s; as much by the experience of leading a black person’s life as it is by the experience of leading a white person’s life; as much by the experience of living a catholic life as it is by the experience of leading a protestant life; and so on. There is also a developing body of research which indicates that diverse collective bodies make better decisions than homogenous ones.

So, if this, in very broad terms is ideally what we want of our judiciary, how do we go about getting it, or at least as close as possible to it? How do we go about recruiting and selecting judges who are independent, incorruptible, of high quality and suitably diverse in background and experience?

Selecting people to be judges: how might we do it?

There are many different ways of selecting judges, but in the democratic world they fall into two broad categories, with sub-categories within them.

(a) Civil law systems

In one category are the civil law systems: that is, the systems used in most of continental Europe and in Latin America and the far Eastern countries, such as Japan and the Philippines, which have adopted broadly civilian legal systems. They mainly have a career judiciary: lawyers who choose to go into judging rather than into private practice, government service or academia. Often, judges and prosecutors are treated as a common profession and people can move between judging and prosecuting and also various administrative roles. These judges are

³ Attributed to Mary Jeanne Coyne, Associate Justice of the Minnesota Supreme Court, 1982-1996.

recruited by specialist study and examination after they have completed their law degrees. They tend, therefore, to begin their judging much younger than we do, without experience of other roles within the legal system or of life outside it altogether. Some civilian countries, for example the Netherlands, have a dual system whereby some judges are recruited in this way and some come in later from practice. After initial qualification and recruitment, however, much will depend upon how decisions as to deployment and advancement are made, which may be in the hands of the judiciary themselves, or of government, or a combination of the two.

Another feature of civilian legal systems is that they tend to have far more judges than we do. This is because their inquisitorial processes are far more demanding of judge time than our adversarial processes which leave so much to the parties. They also tend to pay their judges much less than we do.⁴ This may be because they need more of them; or because they do not need to attract them from lucrative private practice; or because in some countries judging is not regarded as the relatively high status job that it is here; or any combination of these.

(b) Common law systems

In the other category are the common law systems of the Anglo-American world: that is, most of the former British Empire, the United States and Canada, the Anglo-Caribbean, the former British colonies and protectorates in Africa, the Indian sub-continent, Australia and New Zealand. No doubt there are many different methods of appointing judges within this disparate group of countries, but most of them do not have a career judiciary in the continental sense. Mostly they recruit judges who have done something else in their lives, often but not exclusively as an advocate or litigator, before turning to judging.

From that constituency, there are three main methods of recruitment: a ‘tap on the shoulder’ from government; election by popular vote; and independent merit-based selection. But there are many overlaps and variations within each of these.

⁴ European Commission for the Efficiency of Justice (cepej), *European Judicial Systems*, Edition 2012 (2010 date), figs 11.15, 11.19, 11.23.

(i) Tap on the shoulder

By ‘tap on the shoulder’, I mean systems in which the government of the day chooses the judges. This used to be the system in the United Kingdom. It is still the broadly the system for federal appointments in the USA, Canada and Australia, and in many other places. But there may be safeguards built in. The appointing or recommending Minister is often a high-ranking lawyer: in our case it was the Lord Chancellor, who was Head of the Judiciary as well as a senior government Minister; in Australia, it is the Attorney-General. The appointing or recommending Minister may take advice, rather than rely on his own so-called ‘secret soundings’ or political intelligence. In Canada, for example, there are appointment commissions which select on merit and recommend candidates to the Minister: but they give him a choice. Jimmy Carter introduced a similar system for federal appointments in the USA, but not all Presidents have followed suit. And the government’s nominations may need ratification in Parliament, as happens in the United States.

(ii) Popular election

Election by popular vote takes place in some, but not all, of the States of the USA. It was introduced for admirable reasons, to counter the ‘jobs for the boys’ effect of the ‘tap on the shoulder’ method, to open up the judiciary to a broader section of the community. In some States it is overtly party political, in others it is not. In some States, re-election is virtually automatic, in other States it is not. In all States, running for election costs a great deal of money, which either has to be found by the candidate or raised from interested donors, usually the local legal profession. Running for election also entails campaigning for the popular vote.

(iii) Independent merit-based selection

In the United Kingdom we now have a system of independent merit based selection with very little – but not negligible – political involvement. In England and Wales, vacancies are notified by the court service to the Judicial Appointments Commission.⁵ The JAC then holds either an

⁵ The process is prescribed by Part 4 of the Constitutional Reform Act 2005, together with the Judicial Appointments Regulations 2013/2192.

individual or a collective selection exercise depending on the number of vacancies. Vacancies are advertised and applications invited, together with references and judicial assessments. In collective exercises, the sift may be done by an on-line examination. Then there are interviews and there may also be role play and other exercises. The JAC then recommends one name per vacancy to the appointing body. They are not given a choice. Most of the full-time judges in the ordinary courts are appointed by Her Majesty the Queen on the advice of the Lord Chancellor. For the higher courts, the JAC reports to the Lord Chancellor who then advises Her Majesty. For the lower courts, the JAC reports to the Lord Chief Justice, who passes the selection on to the Lord Chancellor. Some tribunal appointments are also made by Her Majesty and the JAC reports either to the Lord Chancellor or to the Senior President of Tribunals. But some judicial offices are appointed directly by the Lord Chancellor, the Lord Chief Justice or the Senior President of Tribunals as the case may be.⁶

There is a separate system of appointment to the Supreme Court of the United Kingdom,⁷ reflecting the fact that we are the apex court for the whole United Kingdom and not just an extension of the judicial system of England and Wales. When there is or will soon be a vacancy, the Lord Chancellor must convene a selection Commission. This must have five members, including one representative of each of the selection bodies from England and Wales, Scotland and Northern Ireland. The President of the court is ex officio a member and presides (unless the vacancy is his, in which case he is not a member). The Deputy President was also ex officio a member from 2009 until 2013 (just when I was appointed Deputy). Instead, there must now be a senior member of the judiciary of the part of the United Kingdom from which the vacancy comes, nominated by the President, in practice probably the Lord Chief Justice of England and Wales, or Northern Ireland, or the Lord President in Scotland (unless they are a candidate).⁸ The aim was to reduce the influence of the present members of the court, in the hope of encouraging

⁶ The best place to gain a bird's eye view of the complicated landscape is probably Schedule 14 to the Regulations.

⁷ Prescribed by Part 3 of the Constitutional Reform Act 2005 and the Supreme Court (Judicial Appointments) Regulations 2013/2193.

⁸ SI 2013/2193, reg 11(1).

greater diversity. In reality, that influence is still very considerable, as the Commission has to consult them along with the very senior judiciary from each part of the United Kingdom.⁹

It is for the Commission to decide its own procedures, but in practice these are very like the procedures adopted for other judicial vacancies, with advertisements, applications, short-listing and interviews. In the past, vacancies have been filled individually as they arose, as it happens always by a man. But this year, the Commission decided to group together the one vacancy from last year with the two from this year and fill all three at once. They plan to do the same for the three vacancies we shall have next year (and possibly for the three which will arise in 2020). This has resulted in the appointment of two men and one woman, so at long last we shall have a second woman on the court.

As already mentioned, when the JAC or selection commission reports a selection for any judicial vacancy, the body to whom the report is made does not have a choice of people: he or she is presented with the same number of names as there are vacancies. There are then three courses of action open to him or her: to accept the selection, to reject it, or to ask the Commission to think again. But reasons have to be given for the last two. In practice, it has not happened. But the Lord Chancellor does have to be consulted in advance about the criteria for and process of selection of the Lord Chief Justice and Heads of Division,¹⁰ which, as recent experience has shown, can lead to certain otherwise meritorious candidates being excluded.

All judicial appointments must normally be ‘on merit’. When the Constitutional Reform Act 2005 was under discussion, the Joint Committee on Human Rights proposed that there should be a duty, akin to the one which there used to be in Northern Ireland,¹¹ to appoint a judiciary reflective of the community it serves.¹² But many in Parliament thought that merit and diversity

⁹ *Ibid*, reg 18.

¹⁰ 2005 Act, s 70(2A).

¹¹ Justice (Northern Ireland) Act 2004, s 3; since replaced with a provision more in line with both England and Wales and Scotland.

¹² Joint Committee on Human Rights, 23rd Report of Session 2003-2004, *Scrutiny of Bills: Final Progress Report*, para 1.83.

were competing rather than complementary values. So instead there is a duty to ‘have regard to the need to encourage diversity in the range of persons available for selection’¹³ (and Northern Ireland has now been brought into line). This is expressly subject to the provision that selection must be ‘solely on merit’.¹⁴ In the Supreme Court, however, this merit requirement is subject to the requirement that we have at least one Justice who has knowledge of, and experience of practice in, the law of each part of the United Kingdom, the Celtic quota.¹⁵ In practice, there have always been two Justices (and previously Law Lords) from Scotland and usually one from Northern Ireland. Increasingly, it is argued that Wales is also a ‘part’ of the United Kingdom with its own laws and should therefore have its own Justice. Fortunately, one of the recent appointments to the court would undoubtedly qualify as having knowledge and experience of the law and practice in Wales.

Another variety of independent selection is where the judges themselves choose the judges. In a way this is what used to happen here. The Lord Chancellor was a member of the government but he was also a Judge and Head of the Judiciary. Robert Stevens tells us that ‘naked political appointments’ to the judiciary became unacceptable with the Liberal landslide of 1906 - apart from the Law Lords, where the practice continued until the 1930s.¹⁶ Lord Carson, of ‘Ulster will fight and Ulster will be right’ fame, is an example. It is also said that politics have not been a consideration since the Labour government of 1945, when there were nowhere near enough Labour-leaning lawyers to appoint, even supposing that the government had wanted to do so. And the Lord Chancellor always relied very heavily on the views of senior judges when making his recommendations. It was largely to reduce their influence that the new system was introduced by the 2005 Act.

¹³ Constitutional Reform Act 2005, s 64(1).

¹⁴ *Ibid*, s 63(2).

¹⁵ *Ibid*, s 27(8)

¹⁶ Robert Stevens, ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’ (2004) 24 *Legal Studies* 1, p 12.

How do these selection methods meet the four criteria?

(a) Independence

A recent survey of thousands of judges from 26 European countries found that in six countries the judges' perception of their own independence scored more than nine out of ten: the United Kingdom was one of those countries, along with Ireland, Denmark (at the top in this as in every other respect surveyed), Finland, Norway and the Netherlands.¹⁷ On the whole, those countries also scored comparatively highly in the perceptions of their independence held by the general public and businesses.¹⁸ Albania, Bulgaria, Latvia and Serbia came bottom in judicial perceptions, scoring between six and seven out of ten. Bulgaria was also among those scoring badly with the general public and businesses. But in some countries, such as Italy and Spain, there is quite a mismatch between the perceptions of the judiciary, which are high, and of the public, which are not. Interestingly, the Polish judges were in between the two extremes, but that was before the passing of two new laws which will put the appointment of judges in the hands of Parliament. Very few of the Polish judges felt that their independence was respected by government or Parliament.

There must be some link between perceptions of judicial independence, at least of independence from government, and the way judges are appointed. Ministerial selection and popular election are obviously the most likely to lead to party political appointments, as undoubtedly happens in the USA and has been known to happen elsewhere, including here until the early part of the 20th century.

Independent merit-based or judicial selection is probably least likely to lead to party political appointments. I do not know the politics of most of my colleagues. But there are some who think that we have gone too far in the opposite direction, in excluding virtually all political involvement in the process of selecting individuals, especially for the most senior appointments.

¹⁷ European Network of Councils for the Judiciary, *Independence, Accountability and the Quality of the Judiciary, Performance Indicators 2017*, ENCJ Report 2016-2017, Part 5, 'Survey about independence among judges 2017'.

¹⁸ European Commission, *The 2016 EU Justice Scoreboard*, COM (2016) 199, section 3.3, 'Independence'.

Charles Moore, for example, has argued that, ‘if they are to decree what is “right” and apply slippery concepts like “proportionality”, rather than sticking to strictly legal issues, we need to know their politics’.¹⁹ Further, he suggests that ‘The effective removal of the Lord Chancellor from the process (in the name of political impartiality), far from opening up the field, has made the judiciary an even tighter club’. Jeremy Paxman has also argued that we need to know more about precisely who our judges are. He asked ‘If the English appointments process is nosy enough to inquire about sexual preferences, why does it not also ask how would-be judges vote in elections?’²⁰ One answer to that is that we ask about sexual preferences, not for selection, but for monitoring purposes, because sexual orientation is a characteristic expressly protected by the Equality Act 2010, whereas party politics as such is not.

Many, perhaps most, members of the judiciary would be very uncomfortable with increasing the involvement of politicians, whether by way of reintroducing an element of ministerial selection or by way of confirmation hearings in Parliament. Does the country really want the minister’s political advisers trawling through the judgments of the recommended candidates so as to select the one with whom they are most comfortable? Are we really so consistent or predictable that that would be a profitable exercise? One answer to Moore is that ‘strictly legal issues’ have always required an element of judgment, some of it moral or political with a small ‘p’. The answer which Paxman accepts is that in the United Kingdom, unlike the USA, the Supreme Court is not supreme: Parliament can always trump the judiciary by passing a new law. My own humble suggestion is that, for the Supreme Court, the Lord Chief Justice and other Heads of Division, the appointments commission could be enlarged by a senior politician from the Government and a senior politician from Her Majesty’s loyal opposition, thus introducing an element of democratic involvement while preserving party political neutrality.

Although the common law systems have, until recently at least, theoretically had the greatest scope for political influence, the practice of appointing people who have already made a name for themselves in the legal profession probably enhances the other dimensions of independence. If you have made a career at the independent Bar, you are not suddenly going to turn into a shrinking violet, afraid to offend either the government of the day or, more importantly, the

¹⁹ ‘We’re turning judges into masters of the state, which is not their job’, *Daily Telegraph*, 24 October 2015.

²⁰ ‘Who are you to judge?’ *Financial Times*, 31 October 2015.

senior and appellate judiciary. This may be a greater risk if you join a career judiciary with a recognised promotion ladder at a relatively early age.

But we can over-estimate the impact of selection processes upon judicial independence. The terms and conditions of appointment are also important. Length and security of tenure mean that judges are not looking over their shoulder in fear of removal if they make unpopular decisions. We have seen some terrible examples recently in former Eastern bloc countries where an independent judiciary has been under attack from the politicians in power. We have also seen how judges with security of tenure can belie the expectations of the politicians who appointed them and show real independence of mind in their judgments.

(b) Incorruptibility

The survey of European judges revealed that there are some countries in which the judiciary are confident that none of their number take bribes; once again, these include the United Kingdom, Ireland, Scandinavia and the Netherlands. But there are also countries where a significant percentage of judges do believe that bribes are taken and many more are uncertain whether they are or not; these include Albania, Bulgaria, Latvia and Romania, although hardly any believe that this happens regularly. On the other hand, a survey in 2013 revealed that 23% of the inhabitants of the EU member states assume that taking and giving bribes is widespread in the courts, although again this differs widely from country to country.²¹

The reasons for this disparity between countries almost certainly have more to do with the status and pay of judges than with the ways in which they are appointed. But there is a link between the way in which judges are appointed and their pay, if not their status. As already mentioned, United Kingdom judges are paid significantly more than judges in other European countries. One reason for this is that most of them are recruited from private practice where the rewards are generally higher than in the public service, so that a certain level of remuneration (and benefits) is necessary to encourage them to make the sacrifice.

²¹ See Consultative Council of European Judges, *Challenges for Judicial Independence and Impartiality in the member states of the Council of Europe*, 24 March 2016, para 284, citing Eurobarometer 397 in 2013.

More insidious than bribery are other types of pressure placed upon judges to decide cases in a particular way. Most insidious of all are the pressures which come from within the judge himself or herself. Those businesses and members of the public who rated the independence of their justice systems as very bad or fairly bad mainly attributed this to interference or pressure from government or politicians, interference or pressure from economic or other specific interests, or the status and position of judges.²² The survey of judges did not explore pressure from those sources, but it did explore whether judges felt that decisions in their country had been affected by pressure either from traditional or social media. Most UK judges felt confident that their colleagues could withstand such pressures, while many also felt that their independence is not respected either by the traditional media or by social media.²³

One reason for that confidence could be that judges are mainly appointed from the ranks of independent private practitioners. We pride ourselves on the Bar's cab rank rule, where a barrister may appear for the prosecution one day and the defence the next, or the defendant one day and the claimant the next. Robust independence comes with the territory. But the reality is that many barristers, and indeed solicitors, tend to specialise in representing either claimants or defendants, landlords or tenants, employers or employees, even husbands or wives. However, it does not follow that they will be similarly partisan on the bench – indeed, sometimes quite the reverse, as they know their clients' weaknesses as well as their strengths.

(c) Quality

In Denmark, hardly any of the judges believed that judges had been appointed or promoted otherwise than on the basis of ability and experience within the last two years. The United Kingdom and Ireland were not quite so sure.²⁴ But merit-based selection, with or without political involvement, must be a better way to achieve the desired judicial qualities than any other selection methods. The difficulty, as always, lies in defining and assessing merit. The JAC has

²² *Op cit*, note 17.

²³ *Op cit*, note 16.

²⁴ *Op cit*, note 16.

been making strenuous efforts to do this and to develop and refine its selection processes. This is no easy task and no doubt they do not always get it right (although I believe that the problem is more that they have failed to recognise the merit in some meritorious candidates rather than that they have wrongly discerned merit in some unmeritorious ones). It is always so much easier to recognise merit in people who are like the people who have always done the job, especially if they are people like oneself. Indeed, it is not impossible that the reason for some judges' scepticism about recent appointments is that conscious efforts have been made to widen the pool of those considered eligible for appointment.

(d) Diversity

We know much more about gender diversity than the other dimensions and I do believe that it is a priority to achieve better representation of half the human race on the bench. The continental system of selecting judges on the basis of examinations has generally proved more effective in achieving greater gender equality than have the common law systems. Young women are attracted by a career in the judiciary and are good at passing examinations. So much so that there are now concerns about the 'feminisation' of the judiciary in France, Italy and Spain. But large numbers of female entrants to the bottom rung of the magistracy do not necessarily translate into large numbers of women at the top. As in the common law countries, the percentage of women diminishes the higher up the judicial ladder one goes, and it could be that this is connected with the influence on promotions and appointments to leadership roles of the serving senior judiciary.

But the common law systems are catching up with the civilian systems, especially in countries such as Canada, where there has been a concerted effort on the part of the government, the judiciary and the legal profession to encourage more women onto the bench. The United Kingdom has tended to lag behind, especially in appointments to the higher judiciary. It is not really a cause for congratulation that now, nearly 100 years after the Sex Disqualification (Removal) Act 1919, one fifth of the High Court and Court of Appeal in England and Wales, and one sixth of the UK Supreme Court, are women. But we celebrate because it is such an improvement on the position ten years ago when the JAC was starting work.

I believe that the reason why we have lagged behind is a combination of two factors: first, that we have a legal profession divided into barristers and solicitors; and second, that we have four ranks of the judiciary, with direct entry to each and only limited promotion between them, coupled with traditional assumptions about what sort of lawyer gets what sort of job. Thus very successful QCs are appointed to the High Court bench; less successful QCs, senior juniors and some solicitors are appointed to the circuit bench; solicitors and a few barristers are appointed to the district bench, whether in the county courts or the magistrates' courts; and a wide variety of lawyers, barristers, solicitors and academics, become tribunal judges. For a whole series of reasons, women are under-represented in the senior ranks of the Bar, especially among QCs, although the situation has been gradually improving. There are still many able women who reject or leave the Bar for a more orderly way of life in other parts of the legal forest. And the move from the 'tap on the shoulder' to independent selection may not always have helped – politicians by and large understand the case for diversity better than some at least of the serving judiciary.

I do not suggest that we should abandon our divided legal profession, which has much to commend it in terms of efficiency and access to justice. But I do suggest that we should abandon our traditional assumptions about who gets which sort of judicial job and look for the best wherever it may be found. And that should include nurturing and promoting the best from the lower ranks of the judiciary to the higher ranks. Lord Justice Hickinbottom is a shining example of this, but we need more.

Measures such as this should also help with improving the diversity of our judiciary on other dimensions, such as ethnicity, professional and experience, and socio-economic background, which are harder to tackle.

Conclusion on appointments

Constitutionally, we want to achieve a judiciary which is independent, incorruptible, of high quality and suitably diverse. From this point of view, there are advantages and disadvantages in each of the methods of selecting judges which I have discussed. I believe that the system in the United Kingdom is and has long been highly effective in delivering the first three objectives. It

has not been so effective in delivering diversity. Things are definitely improving now but we should do better.

There are also clouds on the horizon. It is feared that the traditional high-flyers will be deterred from seeking judicial appointment because of the recent changes to the judicial pension scheme, stagnating judicial salaries and an ever-increasing workload. At the same time, it is feared that the enormous cost of qualifying, especially for the Bar, coupled with the diminution in public funded legal work will put off many able young people, especially perhaps from less advantaged backgrounds, from pursuing a legal career, so that there will be fewer high flyers in future.

And there is a niggling nervousness in some quarters that diversity and merit are indeed competing rather than complementary values. We must prove them wrong.

Selecting judges to hear cases

Choosing who should be a judge is not the whole story. Choosing which judge or judges should hear which cases is less discussed but also raises constitutional issues. It is one thing to choose ‘horses for courses’ – the most suitable judge to hear the particular case. It is quite another thing to choose the judges most likely to decide the case in a particular way. Back to the survey of European judges: in Denmark, hardly any judges believed that cases had been allocated to judges other than in accordance with established rules or procedures in order to influence the outcome of the particular case; but in France or Spain around 40% thought that this had or might have taken place; and in the UK the figure was around 7%.²⁵

We like to think that the outcome of any particular case is determined by the law and the evidence and not by the predilections of the individual judge. We like to think that we are not predictable in the way in which we will decide the hard cases where the outcome is not clear. But we cannot have it both ways – we have already accepted that it matters who the judge is. This is

²⁵ *Op cit*, note 16.

particularly so in the final court of appeal, where the cases are all hard and there is nowhere else to go if they are wrongly decided.

In the Supreme Court of the United Kingdom we sit in panels, usually five, sometimes seven and occasionally nine. We have once sat eleven, all the serving Justices.²⁶ We did that so that no-one could say that the result would have been different had the panel been different. Determining the panels is ultimately the responsibility of the President of the court, but there are safeguards to deter him or her from any attempt to pack the panels. The lists are drafted in the first instance by the listing officer, who chooses the dates, and the Registrar, who chooses the panels, using a combination of 'horses for courses' and random selection of non-specialists. These are then considered and approved by the President and Deputy President together. So the list is not the work of one person alone and others should be able to spot if anything untoward were going on.

This would not be a problem if the Supreme Court always sat *en banc*, like the Supreme Courts in the USA and Canada. But if we did, would the politicians be more interested in who is appointed to the court, as is undoubtedly the case in the USA? So there is a connection between the two types of selection!

²⁶ R (*Miller*) v *Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583.