WORLD BAR CONFERENCE 2018
CHOOSING THE JUDGES: THE CONTROVERY CONTINUES

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If Socrates were choosing the judges today, and if he has been quoted correctly over the centuries, he would apply four assessment criteria: the ability to hear courteously, to answer wisely, to consider soberly and to decide impartially. How much have our requirements changed?

The modern quandary is, of course, that an essential element of any mature democracy is a confident, robust judiciary, independent of the executive and legislative arms of government which is tasked with the job of settling not only disputes between private entities, be they individuals or commercial ventures, but disputes between private entities and the state. Even disputes between private entities may involve vested interests of the state or individuals within it.

In the context of an application for a judge to recuse himself from certain high profile criminal proceedings in Scotland, Lord Carloway, now Scotland's most senior judge and then the second most senior said the following:

> It is important for the preservation of judicial independence that judges should deal with the cases which are put before them, especially those which may be difficult or address unpopular issues. Judges are no more at liberty to decide the cases which they will hear than parties are at liberty to select the judges who will try them. – *HM Advocate v Sinclair*, Scottish Criminal Appeal Court, 6 September 2013 (2015 JC 127).

(I should just mention, very much in parentheses, that Lord Carloway was not talking about the occasions on which, when parties have a dispute that they can't resolve themselves, they *can* select the judges who will try them. Arbitration has been a means of settling disputes for centuries and we proudly boast that in Scotland it dates back to the Middle Ages. Choosing the judges in that context, however, is the subject for a different discussion, probably at a different conference.)

There are at least three potential areas of difficulty with choosing state-selected judges:

1. How to select those most able from amongst those who want to do the job.
2. How to exclude or minimise the risk of political or other improper interference in selection.

3. The other side of the coin. How to maximise the pool (from which we are fishing, as Lord Neuberger might say) to increase the chances that the most able will actually want to be selected.

Independence of the judiciary.

In Scotland, this was put on a statutory footing for the first time by section 1 of the Judiciary and Courts (Scotland) Act 2008 which put explicit obligations on the First Minster, the Scottish Ministers, the Lord Advocate, members of the Scottish Parliament and all other persons with responsibility for matters relating to the judiciary or the administration of justice to uphold the continued independence of the judiciary.

The use of the word "continued" one would hope, recognises the fact that we have a long history of valuing judicial independence. Inevitably there has sometimes been perceived a general bias in favour of "the establishment" in the broad sense. But we have thankfully steered clear of party political bias or any politically-motivated undermining of judicial independence, despite a number of our judges historically coming from party political platforms.

What I intend to address is how in Scotland we have sought to square the circle of the state choosing the judges to be independent of itself and how we have gone about choosing individuals who have the essential characteristics for a modern judge. There are the hard skills of intellect, industry and integrity, and soft skills of patience, courtesy and human insight.

Historical context.

Judges have always been formally appointed by the Queen but it is who makes the recommendations that is important. Until devolution in 1999, the UK's senior law officer in Scotland was the Lord Advocate who, after consulting with the Lord President who would himself take soundings from the senior judiciary decided whom he should nominate.

We are a small jurisdiction with a small bar and a small profession. Until the 1980's there were no more than 100 members of the bar in Scotland. There are now about 470 practising members.

So there were no applications, no interviews and certainly no written self-assessments. The appointment was done by a telephone call or the metaphorical "tap on the shoulder". Sometimes, after having been in office for a few years, the Lord Advocate would survey the available talent at the senior bar before his eye alighted on his own desk and he would wistfully suggest that Her Majesty might grace the latest vacancy with himself.

This was a late-entry judiciary, with appointees at the end of successful careers in practice. There was no compulsory retirement age until (as with the rest of the UK) 1959 when the Judicial Pensions and Retirement Act introduced the retirement age of 75 and then the 1993 Act of the same name for appointments after March 1995 introduced a cap of 70.

To the modern eye the system is indefensible and I don't seek to defend it. It produced a white, male (until 1996 exclusively so), middle-aged at best, middle class (perhaps by definition) cadre of High Court judges. But let's take a moment to remember that each one of them regarded the invitation as an immense honour and responsibility. He had been selected by his peers with whom he had worked over many years, he knew that everyone knew he had been asked to do it, he knew the existing judges saw him as an asset to their number, and the intellect, industry and integrity that he had displayed over the years was such that he commanded the respect of the profession. It's fair to say that the hard skills were favoured over the soft. The press and broadcast media were a great deal more restrained in their reporting of judicial proceedings and judicial conduct than they are today. They gladly took a pay cut which at that time of life they could afford and had probably planned for, but which also came with a gold-plated pension. And they got something that a mediator would describe as cheap to give but valuable to receive – a judicial title.

Present system.

That system continued until not long after devolution when the position of the Lord Advocate became a devolved Scottish one The Judicial Appointments Board for Scotland was instituted on an administrative basis in 2002 to make recommendations for senior and middle-ranking judicial office-holders comprising a mix of legal and lay members.

JABS was put on a statutory footing by the Judiciary and Courts (Scotland) Act 2008, section 9. It was constituted as an Advisory Non-Departmental Public Body with its own premises and support staff. It comprises 12 members, four judicial, two legal and six lay including a lay chairing member. The present chair has been in post since 1 May last year and is a very engaging retired engineer and industrialist whose career was spent in various countries with the petroleum company Shell.

I observe that the composition of 4 judges out of 12 is not a million miles away from the proposed 3 judges out of 13 proposed for the Irish Judicial Appointments Commission that is creating such a controversy there.

The judicial and legal members are appointed by the Lord President of the Court of Session and the others via the generic public appointments process which itself involves a panel of three individuals who make recommendations to the justice minister. Members hold office for terms of four years and may serve a maximum, much like (at least so far) the President of the United States, of two terms.

The appointments process involves completing a form, which before it has been populated is 11 pages long. In a self-assessment section, the criteria the applicant has to assess him or herself against comprise some 25 bullet points arranged under 5 categories. Three examples of the candidate's written work are required accompanied by an explanation of how and why the example demonstrates competence in which criteria plus a list of "significant cases, matters, transactions, publications and situations which are examples of your legal work carried out by you (As a guide please provide ten examples)". Then 300 words on why you are applying for the office.

If that sounds confusing, never fear. There's a Guidance Note for Applicants comprising 13 pages, a 12-page job description and a six-page "Competency-Based Self-Assessment Examples of Criteria and Answers" document giving examples of good answers and bad answers to the self-assessment section.

If you make it through the paper sift, there is then a case analysis presentation to the Board or part of it at which the panel introduces unforeseen developments or complications to the scenario to see how the candidate deals with it.

The system is up and running and has been for almost ten years now without major incident or controversy. However, it has been increasingly apparent that the system is not doing as well as it should. In May last year, I don't think as the result of any individual appointments, the Lord President issued a questionnaire to all practising QC's expressing concern at the shortage of applicants for Senators' posts from suitably qualified individuals. The questionnaire contained a list of factors that might put serious candidates off the job such as pay, public scrutiny of judgments, public scrutiny of private life, nature of the workload, lack of control over the workload and lack of control over where it is carried out.

I'm not privy to the results of that questionnaire but it is obvious that the application process itself has acted as a significant disincentive to applying for office. Highly-regarded applicants say they didn't get an interview leaving others doubting that the system is fit for purpose. The trickle-down effect is that successful and able members of the bar have begun to re-think their futures as not including "giving back" in the form of judicial service.

Furthermore, for those who have been practising for years in high-level, high-value, high-difficulty, high-sensitivity and generally high-stakes cases for twenty years or more, who know large swathes of the law inside out, the whole process seems beneath their dignity. I'm not defending that point of view, but I am describing that as fact.

However, JABS has come to recognise that the system has somehow got out of control. One term used is "over-civil-servantised". The paperwork is unnecessarily prolix, heavy and repetitive. It's extremely process-based and there is an implicit

faith that if the process is thorough enough and applied sufficiently rigorously, the optimal outcome will result.

It's also very slow, with a round of appointments taking something in the order of seven months.

So the lesson the new head of JABS has taken heed of is that the appointments system needs to be much lighter, faster and flexible. Those whose applications have previously been rejected are being encouraged to apply again when new appointments are being made.

Furthermore, JABS sees itself as not only turning the handle on a machine that produces recommendations for appointment but also as contributing to fairer justice in Scotland in a wider sense, by engaging with the inevitable "key stakeholders" about the requirements of the judiciary, encouraging diversity, engaging more with the profession and the public to explain their work and generally building up trust in its processes and outcomes which has suffered from neglect in recent years. It also seeks to establish multiple routes to the judiciary, which I take to mean looking more towards a progression through the tiers of the judicial hierarchy and – I think inevitably – the appointment of a non-Advocate to the High Court and Court of Session bench. We should brace ourselves.

Who wants to do it?

The appointments process on its own, though, can't produce a wider, more diverse pool of talent willing to do the job.

There is a wider issue and that is the job itself.

Off-putting:

1. The work nowadays is hard and relentless. 75% of High Court business is sex crime, much of it historical. Civil work has never been more demanding and writing time is at a premium.

2. We have a press seemingly unrestrained in its willingness to criticise judicial decisions which have been anxiously and thoughtfully arrived at, in lurid headlines. Not just the infamous "Enemies of the People" but in more everyday insidious ways such as criticism of criminal sentencing, invariably as being not punitive enough.

Political interference.

Looking at what is happening in Ireland and Poland, I am relieved to be able to report that judicial appointments in Scotland are not, at the moment at least, the subject of political controversy. For all the criticism the appointment process has

faced, the notion that the ruling political party or any other political entity has sought to influence either appointments or particular judicial decisions has not arisen.

In addition to the guarantee of judicial independence already referred to, the 2008 Act, s9(3) provides that "In carrying out its functions, the Board is not to be subject to the direction or control of any member of the Scottish Executive or any other person."

From what I know about the Irish situation, the reform of the Judicial Appointments Commission seems to be very much a party political football. I don't know how serious the outcome might be. The position in Poland is a great deal more sinister and the EU Commission's Reasoned Proposal makes for alarming reading. 13 pieces of legislative reform of the courts in which, "The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch." They have also proposed clearing out the old guard by reducing retirement ages for judges to 65 – or, unbelievably, 60 for women!

It seems to me that the duty of all who participate in the judicial process, as advocates, barristers or judges is day by day to seek to support it and to be wary of the ever-present danger to the rule of law. While the Irish situation may seem relatively benign now, Poland's journey represented by 13 pieces of legislation must have started with a first step. Socrates may not have been applying his mind to the concept of judicial independence as we know it today, but his criteria are no less compelling now than they were in 400BC.