SELECTING THE JUDGES

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1. The judiciary is the most frequently overlooked and misunderstood, as well as being the weakest, of the three branches of government. As Alexander Hamilton famously wrote, unlike the two other branches, the executive and the legislature, it has "neither sword nor purse", and it depends on the other two branches when it comes to finance and enforcement. But the judiciary represents the rule of law, one of the two main pillars on which a modern society rests: without independent, honest, impartial, and competent judges to whom the public have access, the rule of law is undermined. So, the selection (which includes promotion) of judges is a vital and challenging issue.
2. Every country will have its own traditions, customs and laws and therefore there is plainly no "one size fits all" method of selection. One difference, which generally divides the civil law and common law judges is that between a career judiciary and what one might call a late entry judiciary. In civil law countries, law graduates elect either to become judges or to become practising lawyers. So, most judges start off their careers in the law as junior judges (normally after an apprenticeship) and work their way up. In common law systems, most judges are appointed from senior members of the legal profession: it is pretty uncommon for a practising lawyer to become a High Court Judge in England before reaching the age of 50, and it is by no means unknown for a practising lawyer to be appointed a judge well over the age of 60.
3. Each system has its advantages. In the common law system, judges have had greater experience of life through advising and acting for clients, and they will better understand the difficulties faced by the lawyers in court: they were there. And they are less likely to get stale and bored. In the civil

law system, senior judges will have had very substantial judicial experience, and they will have had their judicial abilities tested and verified before they are appointed to more senior and responsible roles – and they may have a better understanding of the problems faced by more junior judges form whom they may hear appeals.

4. My summary so far is, of course, something of an over-simplification. Practising lawyers and academics are appointed to some senior judicial posts in civil law systems – in particular, to constitutional courts. And, in common law systems, judicial careers are starting to become more common. Indeed, the recently retired Chief Justice of Canada started off her judicial career fairly young and moved all the way up the judicial ladder. And in England, we are starting to see Circuit Judges being promoted to be High Court judges more frequently than used to happen, and Tribunal Judges are becoming High Court Judges for the first time.
5. This is at least arguably a healthy development. I would suggest that there is a lot to be said for having a mixture of career judges and late entry judges. It would make the judiciary more diverse, because there would be a greater mix of legal experiences among judges. In the civilian law system, it would introduce into the judiciary a number of lawyers with practical experience of the law at work in the world. In the common law system, it would provide a route to the senior judiciary for those who cannot or do not want to commit to the long hours which are normally involved in a successful professional legal career. A parent with child-care responsibilities might find it impossible to get to the top of the legal profession and thus to become a late entry High Court Judge, but such a person could become a junior judge with a view to making their way up the system.
6. Diversity in all walks of life is important, but in the case of the judiciary that is particularly true. Judges represent justice, and it is simply unjust if a judicial career is not open to, or much more difficult to access for, some

groups. And, if a country regularly has an unrepresentative judiciary, it must mean that it does not have all the best people who could be judges, which is not good for the rule of law. And a judiciary which is not roughly representative of society in itself leads to a reduction in respect for the Judges and therefore for the rule of law.

7. In a common law system, as I have mentioned, judges are selected from the legal profession. And in England, the melancholy truth is that only 13% of top professional lawyers are women, largely because, in general, it is women who tend to have responsibilities and life-choices which make it more difficult to work almost 24/7 as required by so many areas of legal practice these days. So, the fact that there are over 20% of women in the High Court and above, can be seen as a positive achievement, although less than 25% is hardly something to be complacent about. But it is a sign that steps have been taken to encourage and enable women to apply. While the proportion of women judges in the senior judiciary is plainly too low, it is increasing and the proportion of women in the Tribunal and more junior judiciary is over 40%. But the senior judiciary not only has much ground to make up in respect of women, there is significantly more ground in relation to ethnic minorities and people from poorer backgrounds. These imbalances are of course very largely attributable to the way our country as a whole functions, but that is no excuse for not doing all we can to improve representation in the judiciary of unjustifiably underrepresented groups.
8. This concern throws up the thorny issue of whether better judicial diversity should simply be a goal to be achieved by doing everything to encourage and enable people from underrepresented groups to optimise their prospects of judicial preferment. There is a view that it is right to go further, and, at one extreme, have quotas or the like, or, more moderately, have targets or take into account diversity in addition to judicial merit when

deciding on judicial appointment or promotion. I am definitely against quotas and I am against taking diversity into account as a factor, save where there are two equal candidates – the so-called tipping point (which is already permitted in UK law). While we should do all we can to encourage and empower underrepresented groups, we keep an unblinking eye on the lodestar of merit.

9. If you were about to have an operation you would want to know that it was being conducted by the best surgeon available: you would not want to be told that there was a better surgeon, but your surgeon had been selected over him for reasons for diversity. If your favourite football team started selecting players on the basis of having a diverse squad, rather than the best squad, you would not be best pleased. And when it comes to the judge who tries your case, surely the same point can be made? Yes, we must improve the diversity in the pool of candidates, but we must not dilute the merit requirement when it comes to appointment or promotion. This is not merely the view of an old, white, male judge from a relatively privileged background. Many, but by no means all, women judges and lawyers feel the same: they want to get there and be seen to get there on their merits.
10. But who is to choose who gets there: in other words, who should appoint and promote the judges? It is not an easy question to answer, unlike the question who gets rid of a judge. As to that, the concept of judicial independence mandates that judges must have security of tenure, at least until a specified and realistic retirement age, which should not be retrospectively altered. Obviously there have to be long-stop provisions with regard to incapacity or criminal activity, but they should not be too easy to operate.
11. Reverting to judicial appointments, it can be dangerous if they are in the hands of one person, as used to be the case in the UK; although recent Lord Chancellors were impeccable in their judicial appointments and

promotions, it was a matter for the Prime Minister who to appoint as Lord Chancellor, and, particularly as the UK has no coherent written constitution, there was no control over who was appointed. Appointments now have to be approved by the Lord Chancellor, but that is almost always something of a formality: he accepts almost routinely, nominations made by a committee, whose members are selected by different people. It is plainly safer and probably more transparent, but it is much slower and much more costly to administer.

12. There is talk in some quarters in the UK about getting politicians involved in the judicial selection and promotion process, especially for very senior judges. I would oppose that. Judges and politics are not a good mix. Asking judges about their political views is to invite evasions and half-truths (as I fear happens in the US hearings), and why stop with asking judges about their politics – religious beliefs, sexual preferences and much else would be fair game. And there would be a real risk of judges reaching decisions to please a politician in the hope that he would support their promotion, and a positive probability of people suspecting that that was happening. There is no perfect way of appointing judges, but the essential feature of a judicial appointment system is that it has justified public confidence, particularly, but not of course exclusively, in the legal, judicial and political worlds.

13. I entirely agree with para 46 of the 2010 EU recommendation that "[t]he authority taking decisions on the selection and careers of judges should be independent of the executive and legislative powers" and that judicial independence impels that "at least half the members of the authority should be judges chosen by their peers". In the UK, we fall short of those requirements, in that the Lord Chancellor (who is the Minister of Justice)and the Prime Minister have to approve appointments and the judges make up about a quarter of the membership of the Judicial

Appointments Commission, and indeed there are more lay members than legal members, and the chairman cannot be a lawyer. Nonetheless, it is right to record that the Lord Chancellor and Prime Minister have very circumscribed powers, which have been exercised very rarely indeed, and the membership of the Commission has been impressive. The current chairman is dedicated to the maintaining the independence and quality of the judiciary, as indeed were his predecessors, and he performs his role impressively.

14. Finally, a problem which is common in many countries, and which is certainly prevalent in the UK, is finding enough first-class candidates to fill vacancies in the senior and middle-ranking judiciary. The problem is partly due to the yawning gap between what most successful senior advocates can ear and what the most senior judges can earn, a problem which reflects the very substantial differential in top rates of pay wards between the public and private sectors generally. In the UK, this problem has been exacerbated by a complex tax-based assault on the judicial pension which has literally meant that many judges are better off disclaiming their judicial pension. It is not so much, or not only, the money: it is also the message it carries, namely that a judiciary is not valued by the government, and, indirectly, by the public. That is a message which is likely to lead to an undermining of the judiciary, and thus to an undermining of the rule of law.

15. Faced with an insufficient number of first class candidates, the Judicial Appointments Commission has the distasteful choice of lowering the standard or not filling vacancies. In my view, and it has made the plainly right decision, namely not to fill the vacancies, but for how long is that a viable option? Watch this space.

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