

Judicial appointments in the senior courts – a perspective from the United Kingdom¹

Introduction

In any modern legal system which seeks to respect the rule of law, it is fundamental that the judges are, and are seen to be, independent from the executive. It is also essential that the senior judiciary in particular are viewed as legitimate in the eyes of the people who are subject to the laws they interpret and apply. Otherwise public confidence in the judiciary may be diminished, which can have implications in terms of both the public's respect for the law and commercial investment from overseas.

The process and criteria for the appointment of judges are central to achieving these objectives. Getting it right, however, is far from straightforward. How the two objectives I have outlined above should be applied in practice is a matter of considerable debate. Moreover, these objectives do not always pull in the same direction. Thus for some people, in order for senior judicial appointments to be seen as legitimate, the appointments process should be subject to some degree of political accountability (for example through the inclusion of a member of the executive or the legislature on the selection panel), but for others this falls foul of the principle of judicial independence.

To take another example, it is generally accepted that if judges are to have legitimacy in the eyes of the public and users of the legal system, their appointment should be based upon merit; but whilst for some, "merit" means nothing other than jurisprudential ability, for others it requires consideration of the contribution the would-be judge will make to the diversity of the court (whether in terms of legal expertise, gender, ethnicity, social background, or all of these). A related consideration is how the appointments process can be designed to ensure the best possible pool of candidates are willing to put themselves forward for consideration in the first place.

In recent months, the role of the judiciary in Hong Kong has been the subject of heightened public discussion for reasons which are well known and on which I do not venture to comment. At the same time, the shortage of judges has put the issue of appointments into sharper focus. Against that context, my intention today is to outline the changes that have taken place in the United Kingdom over the last decade to the process and criteria for appointing senior judges, and the ongoing debate as to whether these changes have gone too

¹ I am very grateful to Dr Richard Cornes and Tetyana Nesterchuk for their helpful comments on a draft of this paper. The opinions expressed below and any deficiencies are entirely my own.

far or not far enough.² I hope that, in the spirit of the Centre for Comparative and Public Law's objectives, these experiences might be of interest to those considering the current issues regarding the judiciary in Hong Kong.

The position prior to 2005

For the latter part of the 20th Century and the first few years of the new Millennium, the highest 'court' in the United Kingdom was the Appellate Committee of the House of Lords. I use inverted commas as, strictly speaking, it was not a court at all but a committee of the legislature, albeit one whose members had all had distinguished legal careers and, with rare exceptions, had held judicial office in one of the constituent parts of the United Kingdom. By convention, there were twelve members of the Appellate Committee (known as "Lords of Appeal in Ordinary" or colloquially as "Law Lords"), comprising nine from England & Wales, two from Scotland and one from Northern Ireland, although cases were normally heard before panels of five. On taking office, they were appointed to the House of Lords as Life Peers and they were entitled to participate in the business of the House, including debates, as they saw fit.

The head of the judiciary in England & Wales and Northern Ireland was the Lord High Chancellor (known ubiquitously as "Lord Chancellor" for short), who whilst not a full-time judge was entitled to and did sit on the Appellate Committee of the House of Lords from time to time. When he did so (I say 'he' as to date all Lord Chancellors have been male), he would be the presiding member of the Committee. He was responsible for judicial appointments as well as a wider-ranging host of other functions. The Lord Chancellor also sat in Cabinet as a member of the Government and was the presiding officer (effectively the Speaker) of the House of Lords. Convention dictated that, notwithstanding his roles within the executive and legislature, his primary function was to provide an authoritative voice for the judiciary within Cabinet and stand up for their independence even (indeed particularly) when other ministers were engaged in public criticism of judges generally or a particular judgment.

Under this system, Law Lords, judges of the Court of Appeal in England & Wales and the Heads of Division in the High Court were appointed by the Queen on the recommendation of the Prime Minister, who in turn was presented with an informal shortlist by the Lord Chancellor. The usual extent of the Prime Minister's input was not clear; however, there is

² The only true 'UK court' is the Supreme Court, which is the final court of appeal for England & Wales, Northern Ireland, civil and devolution cases from Scotland (its members also sit on the Judicial Committee of the Privy Council, located in the same building, which hears appeals from the Channel Islands, Gibraltar and the Isle of Man as well as certain other common law jurisdictions). Below the Supreme Court level, I focus only upon the Courts in my principal jurisdiction, England & Wales.

firsthand evidence that Margaret Thatcher took a proactive role in selection³ and that John Major did not always accept the preferred candidate of his Lord Chancellor.⁴

All other full-time judges in England & Wales were appointed by the Queen on the direct recommendation of the Lord Chancellor, assisted by around 140 civil servants. Vacancies were not advertised. The Lord Chancellor's Office would instead informally approach those individuals who had been identified as potentially suitable candidates to establish if they were interested in being appointed – known in the profession as the ‘tap on the shoulder’. The details of the selection process and the criteria used were not made known to the public.

Once appointed, judges of High Court rank and above could only be removed by a resolution of Parliament. This principle was modified slightly by the Judicial Pensions Act 1959, which introduced a compulsory retirement age of 75 for judges of the High Court and above. Other judicial office holders were subject to a variety of different retirement provisions. A general judicial retirement age of 70 was subsequently introduced by the Judicial Pensions and Retirement Act 1993. This new retirement age applies to those who were first appointed to judicial office after 31 March 1995. Those judges who were first appointed prior to that date may continue to serve until the age of 75. As a result, a number of serving judges remain subject to the higher retirement age, including a number of Supreme Court Justices. This is a point to which I shall return later.

Around the turn of the Millennium, a growing number of voices could be heard criticising the system which I have just outlined. These included Lords Bingham and Steyn, two of the most eminent Law Lords of their generation.⁵ Concerns about the potential for perceived conflicts between the Law Lords' role as members of the legislature and their judicial functions resulted in a practice statement issued by Lord Bingham in June 2000 to the effect that Law Lords would not in future speak in debates involving "a strong element of party political controversy" or "express an opinion on a matter which might later be relevant to an appeal to the House".⁶ The effect in practice was that the Law Lords ceased to play any meaningful role in legislative matters at all. This led some to suggest that the time had come for a bespoke Supreme Court, separate from the legislature. It was suggested that, in an era when the senior judiciary were increasingly being called upon to review matters of political controversy, particularly in the aftermath of the Human Rights Act 1998, which required judges to consider the proportionality of executive acts and legislation for the first time, there

³ As recounted by one of her Lord Chancellors, Lord Hailsham: see Lewis, *Lord Hailsham: A Life* (Pimlico 1998) and Woodhouse, *The Office of Lord Chancellor* (Hart Publishing, 2001), pp.133-134.

⁴ As indicated by Lord Mackay LC in his evidence to the Home Affairs Committee in 1996: *Judicial Appointments Procedures* (1995-96) H.C. 52-II Q.459.

⁵ See Lord Steyn, *The Weakest and Least Dangerous Department of Government* (1997) P.L. 84 & *The Case for a Supreme Court* (2002) 118 L.Q.R. 382 and Lord Bingham, *The Evolving Constitution*, lecture to JUSTICE, October 2001.

⁶ Hansard HL 22 June 2000, Col. 419.

was a need for the country's highest court to be more conspicuous to the public than a subcommittee of the legislature ever could be.

Concerns were also expressed about the role of the Lord Chancellor as both a government minister on the one hand and the head of the judiciary and occasional Law Lord on the other hand. The domesticisation of the European Convention on Human Rights into English law by the Human Rights Act led some to question whether the Lord Chancellor sitting as a judge in litigation affecting the Government's interests would be contrary to the requirements of Article 6 ECHR, which requires proceedings to be determined by an "independent and impartial" tribunal. On more than one occasion, Lord Irvine, who was Lord Chancellor under Tony Blair from 1997 to 2003, withdrew at the last minute from hearing a case due to threats by the parties' lawyers of an Article 6 challenge.⁷ In April 2003, the Committee on Legal Affairs and Human Rights of the Council of Europe, the body which oversees the operation of the ECHR, passed a resolution recommending on Article 6 grounds that the United Kingdom should cease the Lord Chancellor's role as a judge. Even at common law, his dual responsibilities seemed precarious at a time when the Law Lords were still reeling from the Pinochet litigation.⁸

These concerns were accentuated by the fact that Lord Irvine was seen as a highly party political figure. In 1997, he used the occasion of his first speech to the judiciary since taking office as Lord Chancellor to criticise the former Conservative Government in strong terms, accusing it of "complacency" and "enervating insularity", whilst going on to exhort the merits of Mr Blair's new Labour government. In 2001, when a string of immigration and asylum cases were decided against the Home Office, the Home Secretary David Blunkett made a series of sustained attacks in the media against the individual judges in these cases. Given the constitutional convention that judges do not respond to public criticism, one might have expected the head of the judiciary to rise to the defence of these judges. On not one occasion, however, did Lord Irvine publicly stand up to his Cabinet colleague during this period.

Similar concerns were expressed specifically in relation to the Lord Chancellor's continued role in judicial appointments. In February 2001, the Daily Telegraph reported that Lord Irvine "faced calls for his resignation" after asking several senior lawyers to make donations to the Labour Party at fundraising dinners and in personal letters. His addresses included those who were likely candidates for judicial appointment.⁹ His unapologetic response was: "it is not the case that The Lord Chancellor is not party political". This hardly dispelled any concerns about his continuing role in appointing judges.

⁷ Rachel Sylvester, *Irvine withdraws from sitting as a judge in the Lords*, The Daily Telegraph, 21 February 2001.

⁸ *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119.

⁹ Benedict Brogan, *Irvine in funds for jobs row*, The Daily Telegraph, 19 February 2001.

Proponents of reform also highlighted the striking mismatch between the composition of the judiciary and that of the British public at large. As of 1 April 2002, 85.6% of all judges were male and 14.4% were female and no woman had ever been appointed a Law Lord (the first, Lady Hale, took office in January 2004).¹⁰ There was not a single ethnic minority judge in the High Court or above and only 1.2% of circuit judges and 3% of recorders were of ethnic minority origin. By way of comparison, the 2001 Census recorded that 51.3% of those living in England & Wales were women and 8.7% considered themselves to be of an ethnic minority. It was suggested that the disproportionate number of white males threatened the judiciary's legitimacy in the eyes of other sections of society, and that the opaque nature of the appointments process did little to address this concern or to persuade a greater proportion of female and ethnic minority lawyers to put themselves forward as candidates for the bench.

The combination of these various pressures for change eventually resulted in the announcement by Mr Blair on 12 June 2003 that the office of Lord Chancellor would be abolished, that a new process for appointing judges would be established, and that a new Supreme Court of the United Kingdom would take the place of the Appellate Committee of the House of Lords. Much was made at the time of the sudden nature of this announcement, without prior consultation even in private with the senior judiciary. Once that controversy had died down, however, the focus shifted to the detail of the proposed reforms. The ancient office of Lord Chancellor ultimately obtained a reprieve from abolition and became a corollary title of the new ministerial post of Secretary of State for Constitutional Affairs (renamed Secretary of State for Justice in 2007), whose department later assumed responsibility from the Home Office for criminal justice and associated matters alongside the Lord Chancellor's previous responsibility for the courts and tribunals. That concession aside, the Government pressed on with its proposals. The details of the reforms were the subject of considerable negotiation between Lord Falconer, who had taken over from Lord Irvine as Lord Chancellor, and Lord Woolf, the then Lord Chief Justice. This culminated in the publication in January 2004 of agreed heads of terms for the reallocation of the Lord Chancellor's judiciary-related functions, including judicial appointments, in a document that came to be known as the "Concordat".¹¹ The following year the reformed judicial appointments process and the new Supreme Court found their way onto the statute book in the form of the Constitutional Reform Act 2005.

The Constitutional Reform Act 2005

The most widely reported feature of the Constitutional Reform Act was the establishment of the new UK Supreme Court by Part 3 of the Act, which came into force on 1 October 2009. Sections 23 and 38-39 provide that the Court shall consist of 12 Justices, together with a

¹⁰Banner & Deane, *Off with their Wigs!* (Imprint Academic, 2003), p.129.

¹¹ <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>>

supplementary panel comprised primarily but not exclusively of retired Justices who may sit on an ad hoc basis.¹² Section 23 also provides that the 12 Justices shall include a President and a Deputy President, who have certain specific functions under the Act. This put on a statutory footing the previous informal practice under the old regime of the Appellate Committee being led by a Senior Law Lord and a Second Senior Law Lord. Despite some calls for the new Court to sit as one fixed panel for all appeals (as the Supreme Court of the United States does), section 42 of the Act retained the previous practice of sitting in panels of five, seven or nine. However, the more expansive premises of the new Court building compared to the House of Lords committee rooms have made it easier for the Court to sit in panels of seven or nine in significant cases and this practice is becoming increasingly common.

Transitional provisions under section 24 provided that the first members of the Court were to be the serving Law Lords as of the date of commencement (with the Senior Law Lord becoming President and the Second Senior Law Lord becoming Deputy President).

The appointments process for all subsequent Supreme Court Justices is set out in sections 26-31 of the Act. It can be summarised as follows:

- 1) If there is a vacancy, or if it appears to the Lord Chancellor that there will soon be a vacancy, for the position of President, Deputy President or an ordinary Justice of the Supreme Court, the Lord Chancellor must convene an ad hoc selection commission: section 26(5).
- 2) The selection commission is chaired by the President of the Supreme Court and will also include the Deputy President, together with one member of the Judicial Appointments Commission for England and Wales, one member of the Judicial Appointments Board for Scotland and one member of the Northern Ireland Judicial Appointments Commission: schedule 8, paragraph 1. The Lord Chancellor is responsible for nominating the latter three, one of whom must be non legally qualified. Where the position of President or Deputy President is vacant, the next most senior Supreme Court Justice will ordinarily take their place: schedule 8, paragraph 2. A Justice is disqualified from sitting on a commission for President or Deputy President if he or she fails to give the Lord Chancellor notice that he/she is not willing to be appointed to the current vacancy, in which case the next most senior Justice who has given such notice will sit on the commission instead. A member of the selection commission may not themselves be selected: section 27(7).

¹² There is little analogy between the Supreme Court's supplementary panel to the panel of Non-Permanent Judges of the Court of Final Appeal in Hong Kong. The use of judges from the supplementary panel is rare given that there are 12 full-time Justices and appeals are normally heard by a bench of 5 Justices.

- 3) The selection commission must determine the selection process to be applied for the vacancy in question and must thereafter abide by that process: section 27(1). Interestingly, in a recent article one of the current Supreme Court Justices, Lord Clarke, has suggested that the analogous duty of the Judicial Appointments Commission to determine the selection process for High Court judges (to which I return later) may in principle be justiciable in a claim for judicial review.¹³ In practice, every vacancy since the coming into force of the 2005 Act has been advertised widely in the legal and mainstream press and also on the Supreme Court's website. Candidates have been required to provide a letter with evidence to support how they met the relevant criteria (to which I shall return later) together with a short CV. Serving judges have been required to submit copies of three judgments which they believe demonstrate their judicial qualities, and to explain why those judges are of interest and importance. I am aware from personal communications that one recent selection round involved the short-listing of around five candidates, who were then invited to interview and were asked, inter alia, to make a presentation on their views as to the role of the Supreme Court over the forthcoming years.
- 4) As part of the selection process, the selection commission is obliged to consult the Lord Chancellor, the First Minister in Scotland, the Assembly First Secretary in Wales and the Secretary of State for Northern Ireland. Certain senior judges must also be consulted, including the current Supreme Court Justices and the presiding judges in England & Wales, Scotland and Northern Ireland: section 27(2) and section 60(1). This is subject to the proviso that a judge may not be consulted without having first confirmed that he or she does not wish to be considered for selection.
- 5) The selection commission must submit a report to the Lord Chancellor stating who has been selected, which senior judges have been consulted and "any other information required by the Lord Chancellor": section 28(2).
- 6) When he receives the report, the Lord Chancellor is obliged himself to consult with the senior judges whom the selection commission has consulted, as well as the heads of the devolved administrations in Scotland and Wales and the Secretary of State for Northern Ireland.
- 7) The Lord Chancellor then has three options, which are set in sections 29-31. First, he may notify the selection to the Prime Minister, who is thereupon bound by section

¹³ Lord Clarke of Stone-Cum-Ebony, *Selecting Judges: Merit, Moral Courage, Judgment & Diversity* (2009) 5 HCQR 49, at para. 12.

26(3) to recommend the person selected to the Queen for appointment.¹⁴ Secondly, he may reject the selection. He must give reasons for doing so, and the power is exercisable only on the grounds that the person selected “is not suitable for the office concerned”: section 30(1)&(3). The commission must then select someone else. Thirdly, the Lord Chancellor may require the commission to reconsider their selection. Again, he must give reasons. He may only exercise this power on the grounds that “there is not enough evidence that the person is suitable for the office concerned”, “there is evidence that the person is not the best candidate on merit”, or “there is not enough evidence that if the person were appointed the judges of the Court would between them have knowledge of, and experience of practice in, the law of each part of the United Kingdom” (a requirement to which I shall shortly return): see section 30(2). Upon being asked to reconsider, the selection commission may select the either same person or someone else.

- 8) When the Lord Chancellor rejects a selection and the commission proceeds to make a new selection, he cannot reject that person. He is able, however, to require the commission to reconsider that new selection. Once they have done so, the Lord Chancellor has no further power to reject or require reconsideration: section 29(4).
- 9) When the Lord Chancellor requires a reconsideration of the commission’s initial selection, and the commission proceeds to make a new selection (whether or not for their initial choice), he cannot reconsider them to reconsider that person again. He can, however, reject that person’s selection and require the commission to select someone else. Thereafter the Lord Chancellor has no further power to reject or require reconsideration: section 29(4). In other words, the Lord Chancellor’s powers to reject a selection or to require its reconsideration may each be exercised one time but no more.

The rationale for the Lord Chancellor retaining an involvement in the appointment process, albeit to a much more limited extent than before, was that the appointment of Supreme Court Justices needed to have a degree of political accountability.¹⁵ The Lord Chancellor is thus answerable in Parliament for appointments. To date, no Lord Chancellor has exercised his power to reject a commission’s selection for appointment to the Supreme Court or required a commission to reconsider their selection. As I shall explain later, however, there is already one occasion where his similar power of veto in relation to the appointment of the Heads of

¹⁴ The Prime Minister’s role as a conduit between the Lord Chancellor and the Queen is necessary because Supreme Court Justices are appointed by Letters Patent from the Queen, who by constitutional convention acts on the advice of her Prime Minister.

¹⁵ See e.g. Department for Constitutional Affairs, *Constitutional Reform : A new Supreme Court for the United Kingdom* (July 2003), para. 39.

Division has come very close to being exercised. This indicates that the Lord Chancellor's role in the process is more than merely hypothetical.

Section 25 provides that the minimum qualification for appointment to the Supreme Court is to have held high judicial office for a period of two years or have been a legal practitioner for a period of at least 15 years. An alternative criterion was added in 2007 to allow for legally qualified candidates who whilst not in practice have been engaged in law-related activities such as legal academia for 15 years.¹⁶ Unsurprisingly, in practice all serious applicants have had considerably more experience than this. There has been one appointment to the Supreme Court directly from the Bar: that of Jonathan Sumption QC (now Lord Sumption) in January 2012 – the first practising lawyer to be appointed straight to the top tier of the judiciary in the United Kingdom since Lord Reid in 1948. As some of you may know, Mr Sumption's pre-eminence at the English Bar attracted international fame and saw him appear in Hong Kong from time to time. The rationale for his appointment was that he was widely considered, including by several members of the Supreme Court, to be a once-in-a-generation legal mind. The selection commission evidently concluded that his application presented an opportunity not to be missed. It was not, however, without controversy. There were strong objections to Mr Sumption's candidacy in some quarters, in particular and perhaps unsurprisingly from the Court of Appeal, on the basis that he had not 'done his time' on the bench: his judicial experience was limited to a few weeks per year as an appeal judge in the Channel Islands.¹⁷ Indeed he had applied to the Supreme Court for an earlier vacancy in 2009 only to withdraw in the face of the hostile reaction from elements of the senior judiciary.¹⁸ To my mind these criticisms of his selection overlooked the wording of section 25, which stated in the clearest possible terms that anyone with 15 years' experience in legal practice did not need to have held high judicial office in order to be eligible for appointment. If the selection commission were to reject an application on the ground that the candidate in question had not served his or her time progressing through the judicial ranks, it would be subverting the unambiguous intention of Parliament that this was not a mandatory criterion. In any event, the skills and experience required for a first instance judge whose primary job is to find facts and/or apply established law to the facts do not entirely coincide with the requirements for a second tier appellate judge whose function it is to determine points of law of general public importance.¹⁹ Accordingly a seasoned lawyer with a premier league appellate practice in front of his country's top court may be better placed to contribute to that court's jurisprudence than if he had spent a decade deciding commercial trials or judicial review claims at first instance. Ultimately, the proof of the pudding is in the eating: it is therefore

¹⁶ Tribunals, Courts and Enforcement Act 2007, sections 50-52.

¹⁷ See e.g. Joshua Rozenberg, *Likely appointment of Sumption to the Supreme Court is Controversial*, Law Society Gazette 14 April 2011.

¹⁸ < <http://uksblog.com/sumption-qc-withdraws-from-race-to-supreme-court>>.

¹⁹ See Lord Clarke, *supra*, at para. 25.

telling that in the 12 months since Lord Sumption took office, there has been no significant criticism that any of his judgments have been found wanting as a result of his relatively limited previous judicial experience.

The only provision in the Constitutional Reform Act as to the criteria to be applied by the selection commission in considering eligible candidates is section 27(5), which provides that “Selection must be on merit”. What is meant by “merit” is not defined and is a matter of some debate. In particular it has been suggested in certain quarters, including by some Justices of the Supreme Court,²⁰ that a candidate’s ability to contribute to the diversity of the Court by redressing gender or ethnic imbalances can properly be considered as an element of “merit”. Despite the trendiness of this argument and the noble intentions of those advancing it, in my opinion it is misconceived for reasons I shall explain later when I come to deal with the issue of diversity in relation to judicial appointments. What is legitimate, however, is to select candidates with an eye to achieving an appropriate balance of legal expertise on the court. For example, if the Court’s main chancery specialist announces his or her retirement, a candidate with a chancery background might be considered more meritorious than a public lawyer whose appointment would leave the Court under-strength in chancery expertise.²¹

In practice, the Supreme Court selection commissions which have been convened since the Act came into force have defined their own criteria for testing merit, presumably relying on their power under section 27 to determine their own process. The most recent advertisement for a vacancy, in October 2012, stated:

“The cases dealt with by the Supreme Court include the most complex in the courts of the United Kingdom and demand the deepest level of judicial knowledge and understanding, combined with the highest intellectual capacity. Successful candidates will have to demonstrate independence of mind and integrity and that they meet the criteria listed below TO AN EXCEPTIONAL DEGREE.

- Knowledge and experience of the law.
- Intellectual ability and interest in the law, with a significant capacity for analysing and exploring a range of legal problems creatively and flexibly.
- Willingness and ability to learn about new areas of the law.
- Clarity of thought and expression, reflected particularly in written work.
- An ability to work under pressure and to produce work with reasonable expedition.

The successful candidates will also need to demonstrate the following qualities:

²⁰ See e.g. Lord Clarke, *supra*, at para. 28 and the discussion in the House of Lords Constitution Committee, *Judicial Appointments* (HL Paper 272, 28 March 2012) at paras. 89-94.

²¹ See Lord Sumption, *Home Truths about Judicial Diversity*, Bar Council Reform Lecture, 15 November 2012. It should be borne in mind that the Bar of England & Wales, which continues to be the primary pool from which judges in the jurisdiction are drawn, tends to be more specialised in their areas of practise than the Hong Kong Bar.

- Social awareness and understanding of the contemporary world.
- An ability to work with colleagues, respecting their views, but also being able to challenge and debate in a constructive way.
- A willingness to participate in the wider representational role of a Supreme Court Justice, for example, delivering lectures, participating in conferences, and talking to students and other groups.
- Vision, coupled with an appreciation of the role of the Court in contributing to the development of the law.

In considering these qualities, the commission will have regard to the background and experience of the candidates.”

A further consideration to which the selection commission must pay regard is the need for the Supreme Court Justices to have between them sufficient expertise of the three different jurisdictions from where the Court’s cases are drawn: England & Wales, Northern Ireland and Scotland. This is made clear by section 27(8) provides that, in making selections for the appointment of Supreme Court Justices, “the commission must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom”. This potentially allows for greater flexibility than the previous unwritten convention that two of the Law Lords would be from Scotland and one from Northern Ireland. In practice, however, that convention has been maintained to date. Recently, there have been calls for there also to be a dedicated Welsh judge in the future, which is a matter to which I shall turn later when looking at the current proposals for further reform.

Whereas Supreme Court appointments are dealt with by way of ad hoc selection commissions, for appointments to the High Court and Court of Appeal bench in England & Wales the Constitutional Reform Act established a new Judicial Appointments Commission (“JAC”).²² The JAC is a body corporate consisting of fifteen members appointed by the Queen on the recommendation of the Lord Chancellor. Six members, including the Chairman, must be non legally qualified. Of the remainder, five must be judges, one must be a tribunal member, one must be a lay Magistrate, and two must be practising lawyers: see schedule 13 to the Act. The rationale for the mix of judges, lay members and practitioners was that:²³

“Judicial representatives provide expert knowledge of the requirements of judicial posts, legal members provide representation from the pool from which candidates are drawn, and lay members provide input from outside the legal world and represent the community served by the courts.”

²² Constitutional Reform Act 2005, section 61.

²³ Department for Constitutional Affairs, *Constitutional Reform : A new way of appointing judges* (July 2003), para. 119

The process for the appointment of the Lord Chief Justice and Heads of Division can be summarised as follows. The JAC must convene a four-member selection panel, which sits as a committee of the JAC. The selection panel must include the most senior Supreme Court judge from England & Wales who is not willing to be considered for appointment or his nominee, the Lord Chief Justice or his nominee, the chairman of the JAC or his nominee and a lay member of the JAC.²⁴ The selection panel passes its selection to the Lord Chancellor, who has the same power to reject the selection or require the Commission to reconsider as he does in relation to Supreme Court appointments. A similar process exists for the nomination of Court of Appeal Justices, except that that the four-member selection panel contains a Head of Division or Lord Justice instead of a Supreme Court judge.²⁵

For High Court judges and other positions such as tribunal judges, the Constitutional Reform Act leaves it to the JAC to determine the process to be applied, subject to a requirement to consult the Lord Chief Justice and one other person “who has held the office for which a selection is to be made or has other relevant experience”: section 88(3). Again, the Lord Chancellor has power to reject the selection or require the Commission to reconsider.²⁶

All vacancies are widely advertised by the JAC. Applications are submitted by means of an electronic application form which is bespoke to the particular vacancy in question. For the majority of selection exercises, candidates are also required to undertake an online test, designed to assess their ability to perform in a judicial role by analysing case studies, identifying issues and applying the law. There follows a process of shortlisting. Shortlisted candidates are then invited to an open day which normally involves interviews, role-plays simulating a court or tribunal environment and situation questioning testing how a candidate would respond in a particular situation. The selection panel will then decide upon its preferred candidate and report to the Lord Chancellor (having first undertaken the section 88 consultation where required). Currently, the average duration of selection exercises, from advertisement to appointment, is 44 weeks.²⁷

The Lord Chancellor is empowered by section 65 of the Constitutional Reform Act to issue guidance to the JAC about “procedures” for identifying candidates and assessing them. Before publishing guidance, the Lord Chancellor is required to consult the Lord Chief Justice and lay it before Parliament for approval. It seems reasonably clear from the statutory wording that the guidance may only be procedural in nature. It would certainly be contrary to the spirit of the Act if the executive were able to influence the independent JAC on issues of substance, such as the factors that they should and should not take into account in

²⁴ Constitutional Reform Act 2005, section 72.

²⁵ See sections 76-84.

²⁶ See sections 89-94.

²⁷ JAC Annual Report 2011-12.

determining applications. Guidance which sought to do that would, in my view, be vulnerable to challenge in Court by way of judicial review.

As with Supreme Court appointments, section 63(2) provides that for all positions within the JAC's remit "selection must solely be on merit". Section 63(3) also provides that "a person must not be selected unless the selecting body is satisfied that he is of good character". Curiously, there is no express requirement for Supreme Court Justices to be of good character, although it would be quite brave to argue that the principle *inclusio unius est exclusio alterius* applies here!

Section 64 provides that, subject to the merit and good character provisions, "the Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointment". This is intended to redress the significant gender and ethnic imbalance at all levels of the judiciary, which I have described earlier. The JAC has taken a number of proactive steps to give effect to this requirement, including (but by no means limited to) undertaking regular outreach events (36 in 2009-10 and 25 in 2010-11) which seek to encourage people to consider a judicial career. For example, the JAC's website is currently advertising an event entitled *A career within the judiciary: courts and tribunals – a woman's perspective*, which will take place in Cardiff on 27 February and will include five keynote speakers, all women, from a range of different levels of the judiciary.

The quality of the JAC's website (www.jac.judiciary.gov.uk) cannot be praised highly enough. Its front page prominently displays a rotating series of vignettes written by judges and tribunal members from a wide range of demographic backgrounds as to why they applied to the bench, what the process involved and the highlights of their job. There are pages that help candidates to consider whether they are ready for a judicial appointment and if so at what level. You can watch a film of a mock interview. There are a series of "day in the life" case studies explaining what successful candidates can expect. A list of current and anticipated selection competitions is also displayed on the front page together with information about the timescales and processes involved. Biographies of each member of the JAC are also provided. An indication of the website's success is that from May 2011 until March 2012 it received over 122,000 unique visits.²⁸

These steps appear to be paying off. In 2007-08, there were 27 selection exercises for which 2,535 applications were received (an average of 93.8 applications per exercise). In 2010-11, there 21 selection exercises but 4,684 applicants (an average of 223 applicants per exercise) and in 2011-12 there were 25 selection exercises and 5,490 applicants (an average of 219.6

²⁸ JAC Annual Report 2011-12, p.16.

applicants per exercise.²⁹ This marked increase in applications suggests that the JAC's outreach work and the greater transparency of judicial appointments process has persuaded people to put themselves forward for consideration when previously they might not have done so.

As I noted earlier, it has been suggested in some quarters that a candidate's ability to contribute to the diversity of the bench by redressing gender or ethnic imbalances can properly be considered as an element of "merit". In my opinion, this argument is not legally sound. The provision in the Constitutional Reform Act that selection should be "on merit" was intended to put onto a statutory footing the pre-existing policy of the Lord Chancellor, explained in the Government's 2003 consultation paper on the reforms that led to the Act in the following terms (my emphasis):³⁰

"...the guiding principle which underpins the Lord Chancellor's policies in selecting candidates for judicial appointment is that appointment is strictly on merit. The Lord Chancellor appoints those who appear to him to be the best qualified regardless of gender, ethnic origin, marital status, sexual orientation, political affiliation, religion or disability."

The provision that selection must be solely on merit begs the question, "merit as opposed to what?" The words I have just emphasised answer that question.

Moreover, section 64(2) of the Act provides that the JAC's duty to encourage diversity is expressed to be "subject to section 63", which contains the overarching provision that selection must be "solely on merit". This further supports the view that the Act treats merit as a concept distinct from diversity. Whether express provision should be made to take into account diversity in choosing between candidates is a matter currently under consideration, as I shall explain later.

The Act made no changes to the compulsory retirement age either for Supreme Court Justices or for other judges. However, section 36 contained provision for the hopefully rare event of a Supreme Court Justice being "disabled by permanent infirmity from the performance of the duties of his office" and "for the time being incapacitated from resigning his office". Where both these criteria are met, the Lord Chancellor may declare the Justice's office vacated, provided that he has first obtained the agreement of the President and Deputy President of the Court (if the person incapacitated is one of those persons then the senior ordinary judge's consent is required instead). The recent tragic death of Lord Rodger from a brain tumour whilst in office highlighted that the utility of this power was not wholly theoretical. An interesting question which was not addressed at the time of the Act's passage is whether the

²⁹ The statistics can be found in the JAC's Annual Report 2011-12 at p.7.

³⁰ Department for Constitutional Affairs, *Constitutional Reform : A new way of appointing judges* (July 2003), p.13.

case for a continued compulsory retirement age of 70 is undermined by the fact that there is now provision for cases of mental or physical incapacity, which in any event is not the exclusive domain of the over 70s. I shall return to this later.

As you will have noted, whilst the Lord Chancellor's role in judicial appointments has been reduced by the Constitutional Reform Act, it has not been extinguished. He retains some fairly significant powers, such as the right to veto a selection for appointment, the power to nominate certain members of the Supreme Court selection commission and the JAC, and the power to issue guidance to the JAC. At the same time, he is now a creature purely of the executive. He no longer has any ability to sit as a judge in Court, and his previous position as head of the judiciary in England & Wales and Northern Ireland was removed by sections 7 & 11 and transferred to the Lord Chief Justices of those two jurisdictions. And there is now a separate Lord Speaker of the House of Lords pursuant to s.18 and Schedule 6 of the Act. On the face of it, the exclusively executive nature of the Lord Chancellor's new role might indicate a greater risk of political considerations influencing the exercise of his residual powers in relation to judicial appointments. The Act seeks to address this through three safeguards.

First, section 2(1) provides that "a person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience". In practice, however, it is questionable whether this is likely to prove a safeguard of any real substance. This is not least because section 2(2) goes on to define "experience" in broad terms: the Prime Minister may take into account experience as a Government minister, experience as a member of either House of Parliament, experience as a legal practitioner in any constituent part of the United Kingdom, experience as a teacher of law in a university and "other experience that the Prime Minister considers relevant". Whilst the first three Lord Chancellors under the 2005 Act, Lord Falconer, Jack Straw and Kenneth Clarke, had considerable ministerial experience as well as previous careers in law (Falconer and Clarke had even reached silk prior to entering Parliament), the same cannot be said of the current incumbent, Chris Grayling. His appointment was the first time that a non-lawyer had held the office of Lord Chancellor since Lord Shaftesbury in 1673 (who ended up in the Tower of London – a fate which Mr Grayling will doubtless hope to avoid!). Moreover, unlike his three predecessors, Mr Grayling was not a 'greybeard' nearing the end of his career with a host of Ministerial positions already under his belt. His sole Government position had been a two-year stint as a junior minister in the Department of Work and Pensions. The fact that someone so obviously on the make, and thus at least potentially keener to please the Prime Minister of the day, can be appointed without much fuss suggests that section 2 is unlikely to provide any meaningful protection against the risk of a Lord Chancellor being influenced by political considerations in exercising his functions relating to judicial appointments.

Of perhaps greater significance are the other two safeguards in the Act. These are the duties imposed upon the Lord Chancellor and the requirement upon each new incumbent of the office to swear an oath of allegiance to those duties. On the very first page of the Act, section 1 provides:

“1 The rule of law

This Act does not adversely affect –

- (a) the existing constitutional principle of the rule of law
- (b) the Lord Chancellor’s existing constitutional role in relation to that principle.”

This provision is of interest to constitutional lawyers in the United Kingdom as the first express recognition in statute of the principle of the rule of law, but its significance for present purposes is that it seeks to preserve the Lord Chancellor’s previous responsibilities in this regard, for example to stand up for judicial independence even when its interests are divergent with those of the Government. Moreover, section 3(1) specifically states:³¹

“3 Guarantee of continued judicial independence

- (1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

...

- (4) The following particular duties are imposed for the purposes of upholding that independence.
- (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
- (6) The Lord Chancellor must have regard to –
 - (a) the need to defend that independence;
 - (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
 - (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters
- (7) In this section, “the judiciary” includes the judiciary of any of the following –
 - (a) the Supreme Court;
 - (b) any other court established under the law of any part of the United Kingdom;
 - (c) any international court.”

Section 17 provides that every new incumbent as Lord Chancellor, upon accepting office, must swear an oath in the following terms:

³¹ Section 4 imposes similar duties on the Northern Ireland Government.

“I [name] do swear that in the office of Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible. So help my God.”

These statutory duties and the Lord Chancellor’s oath of allegiance to them might not be legally enforceable in Court, save perhaps in extreme cases, but their practical effect may still be quite significant since they leave a Lord Chancellor open to severe criticism if he is seen to interfere with judicial independence or undermine the rule of law. Recent experience supports this view. This arises out of the judgment of the European Court of Human Rights that the current blanket ban on prisoners voting in elections is contrary to Article 3 of the First Protocol to the ECHR.³² In response to the Court’s judgment, draft legislation has been prepared which includes three options for consideration by Parliament, including the retention of the blanket ban. The Prime Minister has expressed a firm desire to see this option prevail, having said in the clearest terms: “No one should be under any doubt - prisoners are not getting the vote under this government”.³³ Last month, however, Lord Chancellor Grayling stated that he is unlikely to be able to vote in support of a continued blanket ban because to do so would contravene his oath. He explained that this was because his duty to respect the rule of law extended to international legal obligations including the ECHR.³⁴ The fact that even a relatively inexperienced Lord Chancellor felt compelled by his oath to dissent from the Prime Minister’s clear policy suggests that the oath and the associated statutory duties under the Constitutional Reform Act may play an important part in reducing the risk of a Lord Chancellor allowing the Government’s interests to influence the exercise of his remaining functions relating to the judiciary and judicial appointments.

Problems with the Constitutional Reform Act and current proposals for change

In spring 2011, the House of Lords Select Committee on the Constitution commenced an inquiry to review the framework of the judicial appointments process in the light of the experiences gained in the first six years since the Constitutional Reform Act. Having received extensive written and oral evidence, the Select Committee published its report in March 2012.³⁵ The report supported the overall framework established by the Act, but suggested some limited changes together with additional measures to promote diversity among the judiciary.

³² See *Hirst v. United Kingdom* [2006] 42 EHRR 41. The issues surrounding the disenfranchisement of prisoners are also familiar to Hong Kong: see HCAL/79/2008 *Chan Kin-sum & Choi Chuen-sun v. Secretary for Justice* [2009] 2 HKLRD 166.

³³ <<http://www.bbc.co.uk/news/uk-politics-20053244>>

³⁴ <<http://www.telegraph.co.uk/news/politics/9717241/Chris-Grayling-cant-defy-Europe-over-prisoner-voting.html>>

³⁵ HL Paper 272, *Judicial Appointments* (28 March 2012).

Whilst the Committee's inquiry was underway, in November 2011 the new Coalition Government published a consultation paper canvassing views on potential amendments to the Constitutional Reform Act, including most controversially an enhanced role for the Lord Chancellor in the appointment of Supreme Court Justices and the Lord Chief Justice.³⁶ Those proposals were carried through into Part 2 of the Crime and Courts Bill 2012 which is currently being considered by Parliament.

In its original form the Bill proposed to remove the Lord Chancellor's power to reject a nomination for appointment to the Supreme Court or Lord Chief Justice. Instead, the Lord Chancellor would sit on the selection commission. In each case, the explanation given by the Government for the proposed change is expressed in the following terms:³⁷

“Given the importance of this role and the level and nature of engagement between the [Lord Chief Justice / President of the Supreme Court] and the executive, there is a clear case for providing an opportunity for the executive to express a view in terms of its accountability to the public and Parliament to provide for an effective justice system.”

It is clear from this that the Lord Chancellor responsible for the Bill when it was introduced, Kenneth Clarke, was of the view that the Constitutional Reform Act had gone too far in diluting the executive's input into the appointment of senior judges. Similar sentiments were expressed by his immediate predecessor, Jack Straw, in a lecture last month, in which he argued that one advantage of the old regime was that it allowed the Lord Chancellor to promote talented lawyers who might not otherwise have sought advancement.³⁸

Perhaps unsurprisingly, this element of the Crime and Courts Bill was met with a hostile reaction in many quarters. The Select Committee reflected the view of many when it stated that any closer involvement by the Lord Chancellor in the appointments process “would risk politicising the process and would undermine the independence of the judiciary”.³⁹ The Committee's Chair, Baroness Jay, also highlighted that replacing the Lord Chancellor's veto with a seat on the selection committee raised the prospect, at least in theory, of the Lord Chancellor being outvoted on the panel and thus finding himself faced with a Lord Chief Justice or President of the Supreme Court with whom the executive did not feel able to work.

In the face of these criticisms, Mr Clarke's replacement as Lord Chancellor, Chris Grayling, revised the Bill in December 2012 so as to drop this proposal. Yet the fact that the Prime Minister was content to allow Mr Clarke to promote these proposals in the first place, and presumably to vote for them when the Bill reached the House of Commons, indicates that we

³⁶ Ministry of Justice, *Appointments and Diversity* (November 2011).

³⁷ *Ibid*, para. 64 & 71.

³⁸ Joshua Rozenberg, *Jack Straw on judicial appointments: 'Labour Went too far'*, *The Guardian*, 4 December 2012.

³⁹ See para. 139 of its report, reiterated in the Committee's Report on the Crime and Courts Bill (HL Paper 17, 18 June 2012).

cannot yet consider the existing arrangements in the Constitutional Reform Act to be politically entrenched.

I personally consider that the Constitutional Reform Act does not go far enough. In my view, notwithstanding the Lord Chancellor's statutory duty and oath to protect the rule of law and judicial independence, there is no place in the United Kingdom for a member of the executive to have any active role in the appointment of judges. By definition, it is an interference with the independence of the judiciary from government. Until recently, it was thought that the Lord Chancellor's residual power to reject a nomination or require it to be reconsidered was likely to prove theoretical only, leaving the Supreme Court selection commission and JAC as both the *de jure* selectors and the *de facto* appointers of senior judges.⁴⁰ If this were right, it is to be welcomed, but the statute ought to be amended to reflect the reality. If it is considered appropriate for the executive to retain a formal but non-active role in the process, this is already provided in relation to Supreme Court Justices through the requirement that all recommendations for appointment are ultimately made to the Queen by the Prime Minister, who has no discretion to recommend anyone other than the person notified to him. Similar arrangements could be made for other judicial appointments, retaining the Lord Chancellor's formal involvement but removing his discretion.

In fact, a recent lecture by Jack Straw, Lord Chancellor from 2007 to 2010, suggests that the Lord Chancellor's powers under the Constitutional Reform Act may not be as theoretical as some first thought. Mr Straw revealed that in 2010 he had come within a hair's breadth of rejecting one particular selection for a senior judicial position. He declined to name names, but the leading legal commentator Joshua Rozenberg reported that the appointment in question was that of Sir Nicholas Wall as President of the Family Division in 2010 and that Mr Straw had wanted Lady Justice Hallett to be appointed instead.⁴¹ In the event, Mr Straw held back from wielding his veto, explaining in his lecture that:

“Partisans to the appointment – not anyone directly involved in the process – leaked extensive detail to the press; an election was looming; I confirmed the appointment.”

The argument made in defence of the Lord Chancellor continuing to have an active involvement is that it is necessary in order for the appointments process to be politically accountable to the public and to Parliament. In my view, this does not bear scrutiny.

First, the suggestion that the public can hold the Government accountable for judicial appointments at a general election is based on theory and not reality. I doubt that a single vote has ever been swayed at a British election on account of a government's

⁴⁰ See R. Cornes, *Gains (and Dangers of Losses) in Translation – the Leadership Function in the United Kingdom's Supreme Court, Parameters and Prospects* [2011] Public Law 509, at p.519-522.

⁴¹ Joshua Rozenberg, *Jack Straw on judicial appointments: 'Labour Went too far'*, The Guardian, 4 December 2012.

recommendation of a particular judicial appointment. I would suggest that of far greater concern to the public is that the appointment of judges is seen to be free of interference by the government. In any event, a degree of public accountability can continue to be provided by the Judicial Appointments and Conduct Ombudsman, an independent body established by the Constitutional Reform Act to hear complaints about any appointments process.⁴²

Secondly, insofar as it is desirable for the process to be accountable to Parliament, this could easily be achieved by a requirement for the chair of Supreme Court selection commission and the chair of the JAC to report to and appear before a Parliamentary committee at defined intervals. Further or alternatively, as Dr Richard Cornes and I suggested on our evidence to recent House of Lords Constitution Committee inquiry, the Supreme Court selection commission and/or the JAC could include or be required to consult the Speaker of the House of Commons and the presiding officers of the devolved assemblies who, by virtue of the offices they hold, are bound to speak for the entire legislative body in which they sit as opposed any one part of it. This would provide genuine links to Parliament whilst at the same time avoiding partisan political meddling or government interference.

Some of those who gave evidence to the Constitution Committee's inquiry argued that the time had come for Supreme Court nominees to appear before a Parliamentary committee, either before or upon their appointment.⁴³ This is of course what happens in the USA, and it was suggested that a similar move in the United Kingdom would enable the political and judicial elites to better understand the constraints under which each other operates and thus improve their sometimes difficult relationship. This suggestion was rejected by the Constitution Committee, in my view rightly, on the basis that it would risk politicising the process and might deter potential candidates from applying.⁴⁴ There is no proposal for confirmation hearings in the Crime and Courts Bill.

If it is thought that the legislature and the public should have an opportunity of 'getting to know' a new Supreme Court Justice, one means of achieving this would be a convention that new appointees deliver an inaugural lecture open to the public within six months of their appointment, on a topic of their choice, but touching upon their view of the role of the Supreme Court.⁴⁵ This would be relatively straightforward and cost-effective to arrange. The technology already exists for a transcript of the lecture to be published via the Supreme Court website and arrangements could be made to encourage members of the government, legislature and media to attend. I can see no obvious reason why a similar convention could not be established for new Permanent Justices of the Court of Final Appeal in Hong Kong,

⁴² Constitutional Reform Act 2005, paragraph 32, Schedule 12.

⁴³ See paras. 39-41.

⁴⁴ See paras. 42-46 of the Committee's report.

⁴⁵ As suggested by Dr Cornes and me in our evidence to the Constitution Committee's inquiry.

should it be considered appropriate to do so. Indeed it is already customary for the Chief Justice to give a speech upon his inauguration.⁴⁶

One relatively uncontroversial change proposed by the Crime and Courts Bill is to remove the provision for Supreme Court selection commissions to contain both the President and Deputy President of the Court. Instead, it is proposed that the commission shall comprise an odd number of no less than five to include at least one member of the Court, and at least one of the judicial appointments bodies in each of the three United Kingdom jurisdictions. The rationale for this was explained as follows by the Consultation Paper that preceded the Bill:⁴⁷

“The involvement of two serving members of the Supreme Court on the selection panel has given rise to criticism that the Court is appointing in its own image. The Advisory Panel on Judicial Diversity has argued that only one UKSC Justice should be involved, with a second senior judge drawn from the territorial jurisdictions. This is intended to reduce the risk that there is a perception that the selection process results in the appointment of a candidate that “fits in” rather than whether they best meet the merit criteria.”

This change was also proposed by in House of Lords Constitution Committee’s Report on judicial appointments and it has so far survived the various amendments that have been made to the Bill in the House of Lords. Even Lord Neuberger, the current President of the Supreme Court, has described as “indefensible” the fact that under the current system the President and Deputy President sit on the panel that selects their own successors.⁴⁸

Other measures in the Bill to encourage further judicial diversity include provision for the statutory limit on the number of Supreme Court, Court of Appeal, and High Court judges to be modified from an absolute number (12, 36 and 108 respectively) to a full-time equivalent, so as to allow an opportunity for flexible working and job sharing which may encourage applications from those who for childcare or other reasons may not be able to commit to a full time job. Whilst I personally remain unconvinced about the notion of two people job-sharing a full place on the Supreme Court, this proposal seems to be relatively uncontroversial and is in line with the recommendations of the House of Lords Constitution Committee report.⁴⁹ The Bill also proposes a tie-breaker clause, the effect of which would be that, as between two candidates who are considered to be equally qualified for a judicial position, preference may lawfully be given to the one whose appointment would contribute to rectifying the under-representation of some disadvantaged category.⁵⁰ Such a provision exists in other employment contexts by virtue of section 159 of the Equality Act 2010. This

⁴⁶ See e.g. < <http://www.info.gov.hk/gia/general/201009/03/P201009030326.htm>> regarding the inauguration of Chief Justice Ma.

⁴⁷ At para. 60.

⁴⁸ See para.142 of the Constitution Committee’s report.

⁴⁹ At paras. 112-117.

⁵⁰ Crime and Courts Bill 2012, Schedule 13, Clause 9.

proposal has widespread support, although I remain in the sceptical minority. As Lord Sumption, a former member of the JAC, has explained, genuine ties are not particularly common.⁵¹ I fear that a tie-breaker clause might result in covert positive discrimination, by subconsciously making appointing bodies more ready to declare a tie in order to redress a perceived under-representation of a particular category of people. The arguments for and against positive discrimination in judicial appointments are well rehearsed and I do not propose to repeat them today, save to highlight a recent lecture by Lord Sumption, the text of which is available on the Supreme Court website, which in my opinion makes a compelling case against its introduction in the United Kingdom notwithstanding the obvious disadvantages of the current gender and ethnic imbalance in our judiciary.⁵²

I have spent some time discussing the issue of judicial diversity today because it is the subject of considerable debate in the United Kingdom. From what I have seen and read, however, this does not appear to be as significant an issue in Hong Kong. The judiciary here appears to be younger, more balanced between genders (albeit not perfectly), and drawn from a wider pool of ethnic and social backgrounds than in my jurisdiction. I am not entirely clear as to the reasons for this and I would be interested to hear any comments that you may have.

Something which the Crime and Courts Bill does not propose is a change to the compulsory retirement age of 70 for all judges who first held judicial office after 31 March 1995. In relation to Supreme Court Justices in particular, this is regrettable and contrary to the recommendations of the House of Lords Constitution Committee.⁵³ There are countless examples of current and previous Law Lords and Justices who have continued until the former compulsory retirement age of 75 without any hint of their faculties declining. A retirement age of 70 would have robbed the law of some of the finest judgments of greats such as Lord Bingham. Even beyond 75, many have continued to sit as arbitrators (for example Lord Hoffmann) or in overseas jurisdictions such as the Qatar Finance Centre Civil and Commercial Court (for example Lord Woolf and Lord Phillips). The Supreme Court's loss is the market's gain. The obvious solution would be to refer to the former age limit of 75, but there is a case for considering the model adopted by the USA Supreme Court which has no compulsory retirement age at all. In recent years Justices Rehnquist, Stevens, Ginsberg and Scalia have each carried on beyond 75 and many would consider that the Court would have been poorer had they been unable to do so. The obvious question of how to deal with medical incapacity is, as I have already said, not exclusive to the over-70s or over-75s and is

⁵¹ Lord Sumption, *Home Truths about Judicial Diversity*, Bar Council Law Reform Lecture, 15 November 2012, p.6.

⁵² *Ibid*, particularly pp.22-25.

⁵³ See para. 197 of the Committee's Report on Judicial Appointments and paras. 19-20 of its Report on the Crime and Courts Bill.

in any event already catered for in relation to Justices of the UK Supreme Court by section 36 of the Constitutional Reform Act.

A further issue which was not the subject of any significant debate at the time of the Constitutional Reform Act, but which is beginning to gain traction, is whether the Court should contain a dedicated Welsh judge in the same way that it has two Scottish and one Northern Irish Justices. Historically, England and Wales have shared a single jurisdiction, but the creation of the National Assembly for Wales in 1998 and the subsequent conferral of more extensive devolved powers in the Government of Wales Act 2006 have resulted in a growing body of legislation applicable only to Wales in fields such as town and country planning, agriculture, social welfare, and housing. The Administrative Court now has a permanent presence in Cardiff to hear judicial review challenges to the Welsh authorities and so gradually a body of Welsh-only case-law will emerge relating to this bespoke legislation. The lack of any member of the Supreme Court with knowledge of distinctly Welsh law and practice was placed into the spotlight recently when the Court had to consider a reference by the Attorney General under section 112 of the Government of Wales Act as to whether the Welsh Assembly had acted outside its devolved powers in passing the a Bill which enabled it to make and unmake byelaws without obtaining the prior consent of the UK Government.⁵⁴ Effectively this case was a turf war between the Cardiff and Westminster administrations – but decided in Westminster by three Englishman and two Scots. After the appeal had been decided, the Counsel General for Wales, Theodore Huckle QC, highlighted the absence of any Welshman on the Court and suggested that the time may come for change in the not too distant future. So far, Mr Huckle is something of a lone voice in the public eye on this issue, but the fact that the Supreme Court saw fit to issue a public statement that they were aware of his views on the matter “and remain in dialogue” with him about it suggests that the issue is already being taken seriously.⁵⁵

Finally, a recent matter of some controversy is the question of who should be responsible for appointing the Chief Executive of the Supreme Court. The Chief Executive was established by section 48 of the Constitutional Reform Act. Section 48(3) gives her responsibility for the Court’s non-judicial functions as well as such other functions as the President delegates to her. Her role includes responsibility for the administration of the court, including staffing and resources, with a duty under section 51 of the Act to “ensure that the Court’s resources are used to provide an efficient and effective system to support the Court in carrying on its business”. She is also required by section 54 to prepare a report at the end of every financial year “about the business of the Supreme Court during that year”. Despite the significance of the Chief Executive’s role, however, section 48(2) provides that her appointment is the

⁵⁴ *Local Government (Wales) Bill 2012 – Reference by the Attorney General of England and Wales* [2012] UKSC 53.

⁵⁵ *Supreme Court becomes a constitutional animal*, The Guardian Law Blog, 28 November 2012.

responsibility of the Lord Chancellor. Whilst the President of the Supreme Court must be consulted prior to the selection being made, there is no requirement to obtain his agreement. This has been criticised, in my view rightly, on the ground that it is incongruous with the premise on which the Supreme Court was established, namely the need for the UK to have a free-standing top court which is, and is seen to be, entirely independent from the other branches of government. On 18 December 2012, in his first political intervention since stepping down as President of the Supreme Court, Lord Phillips tabled an amendment to the Crime and Courts Bill that would remove the Lord Chancellor's role in the Chief Executive's appointment and transfer it to the President.⁵⁶ The perceived dangers of the current provision were, he explained, first "that the Lord Chancellor, when making the appointment, will be concerned to appoint a candidate who will have regard to his wishes when deciding on the administrative arrangements of the court" and secondly that "because the Lord Chancellor appoints the Chief Executive, the Chief Executive will be expected to defer to the wishes of the Lord Chancellor in relation to the manner in which the Supreme Court is managed". Tellingly, he went on to say this:

"The danger that there will be a perception that the Chief Executive should defer to the wishes of the Lord Chancellor is a real one. I must tell the House that during my presidency it was made quite clear to me that those who served in the Ministry of Justice at all levels were of this view. It made relations with the Ministry of Justice difficult."

The proposed amendment also sought, for similar reasons, to remove the requirement in section 49 of the Constitutional Reform Act for the Chief Executive to obtain the Lord Chancellor's agreement as to the number of officers and staff of the Court and the terms on which they are to be appointed.

The Government has yet to be drawn as to whether or not it will support Lord Phillips' proposal, saying only that it needs more time to consider its implications. The proposal does, however, have the support of a number of prominent lawyers and former judges, including the recently retired Supreme Court Justice Lord Brown, who used his maiden speech in the House of Lords to state:⁵⁷

"...constitutionally, it is no more appropriate for the Lord Chancellor to appoint the chief executive of the Supreme Court merely after consulting with the president of that court than it would be for the president of the Supreme Court, after merely consulting with the Lord Chancellor, to appoint the Permanent Secretary of the Ministry of Justice. The separation of powers means just that - the judiciary is not the Executive."

What this debate suggests is that, in the eyes of many at least, the constitutional issues relating to "judicial appointments" should be viewed not simply in the narrow context of

⁵⁶ See Hansard HL 18 December 2012 Col. 1489-1491.

⁵⁷ Hansard HL 18 December 2012 Col. 1496.

appointments to the bench, but more broadly in relation to the appointment of the staff whose work enables the judiciary to function effectively.

Conclusion

I said at the outset that getting the process and criteria for judicial appointments right is far from straightforward. The fact that, in the oldest common law democracy in the world, the debate rumbles on demonstrates this beyond any doubt. I would suggest, however, that there may be advantages in the system being kept under fairly regular review. What the ongoing debate shows is that the overarching objectives I mentioned at the beginning of this talk - namely for judges to be and appear to be independent from the executive and at the same time carry legitimacy in the eyes of those to whom their judgments apply – are not taken for granted but remain under constant consideration. Whilst there may be disagreement as to how those objectives should be interpreted, no-one seriously questions their relevance as governing principles. That in my view is of immense benefit to the UK legal system and all those who use it.

Charles Banner

Landmark Chambers

8 January 2013