Do We Need Judges?
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1st December 2022

Let me start with three quotes

Firstly

"*There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny*." **Mr Justice Frankfurter** in his concurring judgment in United States v United Mine Workers.

This quote was in the context of a case where the Supreme Court upheld a restraining order that prohibited mine workers from striking!

Secondly

"*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread*." **Anatole France** nobel prize winning French Writer.

Finally, in the trilogy a quote from Nelson Mandela's speech at his trial:

"*Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?... I detest most violently the set-up that surrounds me here. It makes me feel that I am a black man in a white man's court*."

In the last lecture, I asked whether we need juries. In this lecture, I'm looking at a related question: do we need judges? In many ways this is a much more fundamental question. Plenty of legal systems have no juries, but every legal system in the world has judges. An independent judiciary is usually seen as a *sine qua non* (an indispensable and essential condition) of liberal democracy. My own profession, the practice of law, would be impossible without judges. So, far more than the last lecture, this lecture requires us to examine the fundamentals of the legal system.

Let's start by articulating a few arguments in favour of judges. If we were looking to explain why we need judges, what would we say?

First, we would say, judges are essential to the rule of law. In modern society, we need to have legal certainty. We need a body of law that is administered consistently and impartially. We need to know, for instance, what conduct is and is not criminal, so that we can adapt our behaviour accordingly; and we need to know that if we are accused of a crime, we will have a fair trial and the law will be applied impartially to us. In order to make financial decisions, we need to know that our contracts will be enforced, and our property rights protected. And if our rights are violated, we need to know that we can seek justice in court. We need to know that the law will be applied consistently, and that the application of the law won't be influenced by political or personal favour. In order to achieve this, we need an impartial body of decision-makers who are not beholden to the government, and who apply a consistent body of rules, guided by precedent.

Second, we would say, judges provide an important check on the power of the executive, and a safeguard for the rights of minorities. We might say that this is particularly important in a country such as the UK, where a government with a solid majority in the House of Commons has very few other restraints on its power.

On the other hand, what would we say if we wanted to criticise the institution of the judiciary?

First, we'd say that the judiciary is unrepresentative of society, and that it is disproportionately drawn from

privileged groups. Judges from privileged backgrounds frequently sit in judgment on marginalised people whose lives and experiences they do not understand at all. Second, we'd say that judges aren't democratically accountable, and that vesting so much power in the judiciary is undemocratic. Third, we'd say that judges are trained in law, and that an education in law doesn't necessarily equip them to make all of the decisions that our legal system calls upon them to make. We might sum up by asking why we entrust judges with so much power over people's lives.

So, let's dive into these issues in more detail. First, we're going to ask what judges do, and how well they do it. Second, we're going to look at how judges are appointed, to whom they are accountable, and whether they are representative of society. And third, we're going to ask whether we need judges, look at what the alternatives are, and ask what role judges might play in a fairer society.

What Do Judges Do, And How Well Do They Do It?

In the common law world, professional judges are drawn from the ranks of practising lawyers. Their professional experience, therefore, is twofold. First, they are experts in law. Second, they are also experts in advocacy, the art of persuasion.

However, this expertise doesn't necessarily mean that they are qualified to perform all the tasks that our legal system requires them to perform. Let's look at a few of these.

First, a major role of judges is to make findings of fact. Since the vast majority of judicial proceedings in England and Wales do not have a jury, in most cases the judge is the trier of fact. They need to assess the credibility of witnesses, decide between competing versions of events, and evaluate expert evidence.

Judges, with their training in law, are not particularly well-equipped to do this. As I highlighted in the previous lecture, judges often rely on fallacious assumptions when assessing the credibility of witnesses. Many of these assumptions were instilled in them during their training as trial advocates, when they learned how to cross-examine effectively. For example, lawyers and judges often believe that an internally inconsistent account is more likely to be a fabrication. Lawyers will often elicit inconsistencies in a witness's story in an attempt to discredit them. But we know from decades of psychological research that human memory is often poor, that truthful accounts are just as inconsistent as false ones,[1] and that mental health conditions such as PTSD and depression can impair a person's memory and recall.[2] Similarly, in the past, it was often thought that a trial judge's ability to see and hear a witness giving evidence, and observe their demeanour, was important to assessing credibility. But we now know that reliance on demeanour can be very misleading, because a person's demeanour can be affected by their cultural background, and by conditions such as autism and PTSD, among other factors.[3] Legal education doesn't include any training in psychology or mental health. In short, judges don't have any special ability to distinguish truth from falsehood. But they often think they do.

Similarly, judges can and do misunderstand scientific issues, and sometimes this has dire consequences. An infamous example occurred when the paediatrician Sir Roy Meadows testified at the 1999 murder trial of Sally Clark, and said that the probability of two children dying of Sudden Infant Death Syndrome (SIDS) in the same family was 1 in 73 million.[4] This statistic was fallacious in multiple respects. First, Meadows' statistic was based on the false assumption that the probability of dying of SIDS was uncorrelated between children in the same family, which it was not. Second, it also fell into a statistical fallacy known as the "prosecutor's

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[1] Cameron, H E (2010), "Refugee status determinations and the limits of memory," 22(4) International Journal of Refugee Law, 469-511

[2] Herlihy, J and Turner, S (2013) "What do we know so far about emotion and refugee law?" 64 Northern Ireland Legal Quarterly 1, 47–62 http://www.csel.org.uk/assets/images/resources/herlihy-turner-2013-nilq/NILQ-64.1.3-HERLIHY-AND-TURNER.pdf Graham, B, Herlihy, J & Brewin, C (2014), "Overgeneral memory in asylum seekers and refugees," Journal of Behavior Therapy and Experimental Psychiatry 45, 375-380 http://pc.rhul.ac.uk/sites/csel/wp-content/uploads/2019/09/Graham-Herlihy-Brewin-2014.pdf See generally Neale, D and Blair, J, "Bridging a Protection Gap: Disability and the Refugee Convention," Helen Bamber Foundation, 2021 https://www.helenbamber.org/sites/default/files/2021-04/Bridging%20a%20Protection%20Gap%20-%20Disability%20and%20the%20Refugee%20Convention.pdf

[3] See for instance UNHCR, "Beyond Proof: Credibility Assessment in EU Asylum Systems," UNHCR, 2013, pp 62-63 https://www.unhcr.org/51a8a08a9.pdf Lim, A, Young, R L & Brewer, N (2022) "Autistic Adults May Be Erroneously Perceived as Deceptive and Lacking Credibility," *Journal of Autism and Developmental Disorders* 52, 490–507 https://link.springer.com/article/10.1007/s10803-021-04963-4#citeas

[4] See *R v Clark,* unreported, 2 October 2000

fallacy". As Dr Ben Goldacre explained:

> *"Two babies in one family have died. This in itself is very rare. Once this rare event has occurred, the jury needs to weigh up two competing explanations: double Sids or double murder. Under normal circumstances - before any babies have died - double Sids is very unlikely, and so is double murder. But now that the rare event of two babies dying in one family has occurred, the two explanations are suddenly both very likely.*
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> *If we really wanted to play statistics, we would need to know which is relatively more rare, double Sids or double murder."*[5]

Goldacre goes on to point out that the Criminal Division of the Court of Appeal also misunderstood the significance of the figures. He said *"Not only was this crucial nuance missed at the time, it was also clearly missed in the appeal: they suggested that instead of "1 in 73,000,000" Meadow should have said "very rare"."*[6]

Another factor that can affect fact-finding is that, like everyone, judges have biases. These biases can affect how they view a witness's evidence, or how they view the merits of a case. My colleague Keir Monteith KC recently co-authored a report with academics at the University of Manchester, "Racial Bias and the Bench," which surveyed a large group of legal professionals about their experiences of judicial racial bias. Many respondents gave accounts of bias affecting judicial decision-making. For instance, one respondent said:

> *"I represented a client who was a black British youth of no previous convictions. The trial was in the Magistrates' Court. The bench were two old posh white ladies. I knew from the way they looked at him, and looked at the case, as though it was all an unpleasant smell, that they would convict him from the start. We ran a good defence, providing as much information and evidence as we could, the Prosecution barely challenged our position, and the bench convicted on obscure reasoning. It seemed to me to be a decision infused with racial bias."*[7]

Another said:

> *"it is difficult to set out specific instances as they are quite common: a significant minority of tribunal judges treat the evidence of appellants and witnesses from other cultures, countries and backgrounds with scepticism."*[8]

A related problem is an unjustified judicial faith in the police. For example, one respondent said:

> *"While practicing in the magistrates court, I never once saw a tribunal seriously entertaining the idea that the police might have been acting in a racist manner, or even that racialized defendants had perceived the police to have been acting in a racist way towards them (which is often a critical part of the defendant's case)."*[9]

These examples accord with my own experience as a lawyer. Race can often have a big impact on how judges treat a client or a witness, and how seriously they take the client's or witness's evidence. So can other factors such as the client's class, their accent, and how they dress and behave in court. Like all humans, judges take cognitive shortcuts when making decisions, and often those cognitive shortcuts reflect race, class and cultural bias.

So judges are not necessarily well equipped to make findings of fact. They aren't experts, and they often base their decisions on false assumptions.

Second, another major role of judges in our system is to make moral judgments. The most obvious example of this is when a judge passes sentence for a criminal offence. In the English legal system, although considerations of prevention and deterrence are taken into account, the core of sentencing is punitive. Our sentencing policy owes far more to the concept of moral desert than it does to utilitarian ethics. Judges take

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[5] The Guardian, "Prosecuting and defending by numbers," 28 October 2006 https://www.theguardian.com/science/2006/oct/28/uknews1

[6] Ibid.

[7] Monteith, K., Quinn, E., Dennis, A., Joseph-Salisbury, R., Kane, E., Addo, F. and McGourlay, C., "Racial Bias and the Bench: A response to the Judicial Diversity and Inclusion Strategy (2020-2025)," University of Manchester, October 2022 https://documents.manchester.ac.uk/display.aspx?DocID=64125

[8] Ibid.

[9] Ibid.

into account the perceived culpability of the defendant, together with any factors that aggravate or mitigate their moral wrongdoing. Even if the defendant poses no risk to the public and no risk of re-offending, this doesn't preclude their being imprisoned if the judge considers their crime sufficiently serious. And sometimes judges use moralising language from the bench, condemning a defendant using terms such as "wicked" and "depraved".

In effect, the judge is empowered to make moral judgments on behalf of society, to decide what another human being has done wrong and what they deserve. While the discretion of judges has been fettered in recent years by sentencing guidelines which seek to achieve some consistency in sentencing, these guidelines typically reinforce an approach in which culpability is at the heart of sentencing.

We might well ask why we entrust judges with this power. After all, an education in law doesn't imbue a person with the wisdom of Solomon. And judges are disproportionately drawn from privileged backgrounds, and are much less likely to have experienced hardship than are the defendants on whom they sit in judgment. From a moral perspective, for example, we might ask what right a judge earning a six-figure salary has to sit in judgment on a homeless person for stealing bread. Or, to take a real example that occurred in 2018, we might ask how a judge whose family members have financial interests in the fracking industry can send anti-fracking protestors to prison.[10]

And again, we know that bias plays a role. In numerous previous lectures I've talked about the Lammy Review's finding that there were large race disparities in sentencing, especially for drugs offences. The experiences of the respondents in Keir Monteith's survey were consistent with this. For instance, one respondent said:

> *"I have witnessed first hand sentencing disparity between black and white defendants. The black defendant with the least serious offence received an immediate custodial sentence whilst the white defendant received a fine (band e). I have personally represented those defendants one after the other in the same court before the same judge/magistrate."*[11]

So we might well ask why we entrust judges with the power to issue collective moral condemnations from the bench on behalf of society.

Third, and finally, judges also make political judgments. Judges, of course, are supposed to avoid political partisanship. But it's inevitable that sometimes judges decide cases with profound political implications. In the United States, where judges have broad powers to strike down legislation as unconstitutional, this has been a topic of debate for generations. Here in the UK, where we have no codified constitution and Parliament is sovereign, the judiciary historically posed less of a threat to the power of politicians. But since the passing of the Human Rights Act 1998, judicial decision-making has increasingly provoked political controversy.

When judges make decisions which are politically controversial and which thwart the will of the executive, it's often decried as "judicial activism". To a significant extent, however, this is inherent to the protection of fundamental rights. Most human rights instruments define their rights in fairly broad terms: the right to life, the right to liberty, the right to a fair trial, the right to private and family life, and so on. The practical application of these rights is inevitably left to judicial interpretation. Judges have to make evaluative judgments about how far a right extends, and how it should be balanced against other priorities.

What's interesting about the debate over "judicial activism" is that its political contours can change radically over time, depending on the political orientation of the government and the political tenor of judicial decisions. Simply put, most people like judicial activism when it accords with their political views, and dislike it when it doesn't. For instance, in the "Lochner era" of early twentieth century America, when the Supreme Court effectively imposed right-wing economic policies by judicial fiat, socialists were among the strongest critics of judicial activism. Whereas by the late twentieth century, it was conservatives who were vocally criticising judicial activism, being aggrieved by decisions such as *Roe v Wade*[12] which recognised a constitutional right to abortion. Today, as the US Supreme Court has swung decidedly to the right again, we are once again seeing criticisms of the judiciary coming from the left.

Similarly, here in the UK, the debate has to be viewed in its political context. Much of the hardest-fought

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[10] The Guardian, "Fracking protesters walk free after court quashes 'excessive' sentences," 17 August 2018 https://www.theguardian.com/environment/2018/oct/17/court-quashes-excessive-sentences-of-fracking-protesters

[11] Monteith et al., op. cit.

[12] 410 US 113 (1973)

litigation under our Human Rights Act has been concerned with protecting the rights of marginalised groups, such as immigrants, asylum-seekers, prisoners, benefit claimants and homeless people. Sometimes judicial decisions have expanded the frontiers of human rights protection and thwarted government policy. One of the earliest and most dramatic examples was the 2004 case of *A,*[13] in which the House of Lords held that the indefinite detention of foreign national terror suspects without trial at Belmarsh Prison violated the European Convention on Human Rights.

Against this backdrop, most criticism of the Human Rights Act has tended to come from the political right. Some decisions have attracted particular ire, such as the European Court of Human Rights decision in *Hirst*[14] which held that the UK's blanket ban on prisoner voting violated the Convention. The *Hirst* decision is virtually unique in the annals of British human rights litigation, in that successive governments have simply refused to act on it, and prisoners continue to be banned from voting today.

But it's important to note that if the political contours of the UK changed, the debate over "judicial activism" would change too. For instance, if a socialist government came to power and nationalised all the assets of the rich without compensation, we could expect the aggrieved property owners to challenge it in court under Article 1 of Protocol 1 to the European Convention. In those scenarios, it would likely be the left decrying judicial activism and the right supporting it.

It's also important to note that the courts don't always protect the rights of minorities against an overbearing government. Sometimes they throw minorities under the bus. For example, in 2005 the House of Lords decided the case of *N,*[15] in which they held that it did not breach the European Convention to remove a woman with AIDS to a country where she would die an early and painful death from lack of access to lifesaving medication. The European Court of Human Rights reached the same conclusion. This decision represented the law for over a decade, until the European Court revisited its approach in 2016 in the case of *Paposhvili,*[16] and our Supreme Court decided in the 2020 case of *AM (Zimbabwe)*[17] to follow *Paposhvili* and overrule *N.*

Critics of judicial activism often use the word "unelected" when describing the role of judges. So in the next section of the lecture, we're going to take a look at how judges are appointed, to whom they are accountable, and how representative they are of the general public.

How Are Judges Appointed?

How judges should be appointed is often one of the most contentious issues in constitutional law around the world. In some countries, the executive and/or the legislature play a decisive role in appointing judges. For example, as most people know, federal judges in the United States are nominated by the President and confirmed by the Senate. An even more striking feature of the American system is that many state court judges are elected.

Conversely, in other countries, judges are nominated by an independent commission which is designed to be insulated from politics. For example, many Commonwealth countries have a constitutional body called a Judicial Service Commission, which advises the head of state on the appointment of judges. The composition of Judicial Service Commissions varies considerably from country to country, but they usually include some judges and some non-judicial members. Some include members of the legislature, while others do not.

At the most extreme end, there are some countries where the appointment process is wholly controlled by existing judges. For example, this is the case with the "collegium" system for appointments to the Supreme Court of India.

Each of these options has advantages and disadvantages. Where judges are appointed by elected politicians, this ensures some level of democratic involvement in the process. But it also increases the likelihood that party political considerations will play a role in judicial appointments, and that judicial decisions will be affected by political considerations. Similarly, where judges are elected, they are democratically accountable, but this also increases the risk that they will seek to make popular decisions instead of correct ones, and that they will be beholden to the private interests which bankrolled their election campaign. On the

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[13] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68
[14] *Hirst v United Kingdom* (2006) 42 EHRR 41
[15] *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296
[16] *Paposhvili v Belgium* [2017] Imm AR 867
[17] *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, [2021] AC 633

other hand, where the appointment process is independent and dominated by existing judges, this reduces partisan influence. But such systems can also be criticised, on the ground that it makes the judiciary into a self-selecting elite which is not democratically accountable to the public.

So how does it work in England and Wales? In England and Wales, there were radical changes to judicial appointments in the early 2000s. Before then, the key figure in judicial appointments in England and Wales was the Lord Chancellor. The Lord Chancellor occupied an anomalous position: he was simultaneously a politically appointed Cabinet minister, the head of the judiciary, and the speaker of the House of Lords. Most judges were appointed by the Queen on the advice of the Lord Chancellor. Some senior judges were appointed by the Queen on the advice of the Prime Minister, but the Prime Minister in turn would consult the Lord Chancellor. There was no formal recruitment process. Judicial vacancies were not advertised and there was no open competition. The process was often described as a "tap on the shoulder".

Although this might sound like a politically partisan process, this was mitigated to some degree by the fact that the Lord Chancellor would always consult senior judges on judicial appointments, and that the judges' views generally carried significant weight. But this came with some problems of its own. Most judges were drawn from wealthy backgrounds, had attended fee-paying schools, and were white and male. There was inevitably a temptation to appoint judges who fit the same mould as existing judges.

How far did political considerations influence judicial appointments in practice? In Victorian and Edwardian times, the answer was "quite a lot". For example, Lord Halsbury, who was Conservative Lord Chancellor for three periods between 1885 and 1905, was well-known for appointing Conservative politicians and even his own relatives to judicial roles, regardless of merit. In a 2009 lecture, Lord Justice Toulson, as he then was, said that *"[b]efore the First World War judicial appointments were highly political and frequently made with scant regard for whether the person showed any sign of having judicial qualities,"* although he acknowledges that there was a *"marked improvement"* between the First and Second World Wars.[18]

At that time, there was also a convention that the Attorney-General, the Government's politically appointed chief law officer, would be offered the office of Lord Chief Justice when it fell vacant. Lord Toulson highlights that this convention led to the appointment of Lord Hewart, who was Lord Chief Justice from 1922 to 1940, and who was *"widely regarded as the worst Lord Chief Justice of the twentieth century".* His poor performance led to the end of this convention. More positively, however, Lord Toulson says that *"[b]y the second half of the twentieth century there were few instances where political factors were suspected of influencing the judicial appointment process and certainly none in the last 30 years. In recent decades all Lord Chancellors were scrupulous in seeing that the judicial appointment process was strictly apolitical."*[19]

Chris Hanretty of the University of East Anglia has carried out a statistical analysis of all judicial appointments in England between 1880 and 2005. Among the factors he looked at was political affiliation. He found that there was no advantage to having the same political affiliation as the incumbent Lord Chancellor, but that judges were more likely to be promoted if they had been appointed by a government of the same party.[20]

So by the end of the twentieth century, there was no longer a strong perception that political partisanship influenced the judicial appointment process. However, there were still undeniable difficulties with the process. The "tap on the shoulder" system was the opposite of an open and transparent recruitment process. As Lord Toulson states, *"there was a double complaint: that the selections were made in the image of the selectors, resulting in an over-narrow judiciary, and that the process was hidden from public view."*[21]

Under New Labour, there were significant changes. In 2001 the Commission for Judicial Appointments was created, although this was an oversight body, and was not directly responsible for recruiting judges. However, the Constitutional Reform Act 2005 brought about a sea change. The Judicial Appointments Commission, an independent statutory body, was established. For the first time, judges were selected on the basis of open competition and had to apply for their jobs. The principle that judges should be selected on merit was enshrined in statute. The Commission consists of a mix of judicial members, lawyer members and lay

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[18] Toulson. Lord Justice (2009) "Judging Judicial Appointments: Annual Pilgrim Fathers Lecture, 3 December 2009," Plymouth Law and Criminal Justice Review, 2 https://pearl.plymouth.ac.uk/bitstream/handle/10026.1/8944/PLCJR_V2_01_Toulson.pdf?sequence=4&isAllowed=y

[19] Ibid.

[20] Hanretty, C. (2015), "The Appointment of Judges by Ministers: Political Preferment in England, 1880–2005," Journal of Law and Courts, 3(2), 305-329.

[21] Toulson, op. cit.

members. So it is not completely controlled by the existing judiciary, but they play a major role in it.

The 2005 Act also made a lot of other changes to our judicial system. The role of Lord Chancellor was radically reformed, so that the Lord Chancellor was no longer the head of the judiciary or the speaker of the House of Lords. Today the Lord Chancellor, who is always also the Secretary of State for Justice, is normally an MP rather than a peer, and does not even have to be a lawyer. And the Act replaced the Appellate Committee of the House of Lords with the UK Supreme Court.

The Lord Chancellor now plays much less role in judicial appointments than previously. Judges of lower courts and tribunals are appointed on the recommendation of the Commission. Until 2014 the Lord Chancellor was still formally the appointing authority for judges of lower courts and tribunals, although in practice they simply rubber-stamped the candidate selected by the Commission. The Crime and Courts Act 2013 removed even this residual role, so that the Lord Chief Justice and the Senior President of Tribunals are now the appointing authorities for lower courts and tribunals respectively.

Although the Lord Chancellor continues to be involved in the appointment of the higher judiciary, their discretion is very limited. High Court judges are appointed on the recommendation of the Commission. The most senior judges, including the Lord Chief Justice, the Master of the Rolls, the Heads of Division and the Lords Justices of Appeal, are appointed on the recommendation of selection panels appointed by the Commission. The Lord Chancellor does have power to reject the Commission's recommendation or request its reconsideration, but these options can only be exercised twice in relation to a given vacancy.

This removal of ministerial influence from the process has not been uncontroversial. In 2009 Jack Straw, then Lord Chancellor in the Labour Government, requested reconsideration of the Commission's recommendation to appoint Sir Nicholas Wall as President of the Family Division. Sir Nicholas had previously been critical of the Government's reforms to the family justice system. When the Commission recommended Sir Nicholas for a second time, Straw had little choice but to acquiesce. In analysing this case, Professor Graham Gee argues that the Lord Chancellor should have a greater role in appointments. He says *"Ministerial involvement can inject a substantial degree of democratic legitimacy and accountability into the selection regime—and, by extension, into the judiciary as an institution of government."* He argues that instead of having to accept or reject a single name, the Lord Chancellor should be able to choose from a shortlist of between three and five names prepared by the Commission.[22]

We can see, then, that the question of how judges should be appointed is highly controversial. If the selection process is dominated by the existing judiciary, this may produce a more independent judiciary, but some argue that it also produces a judiciary which is wholly unaccountable to the public. Conversely, if the selection process has a significant degree of political involvement, this might be said to make the process more democratic, but it might also make the process more partisan and reduce its independence from the government of the day.

To Whom Are Judges Accountable?

Now that we've seen how judges are appointed, and why it's controversial, we need to look at how judges are held accountable. In England and Wales, judges are supposed to enjoy judicial independence, and a major component of that independence is that it is difficult to remove them. For the senior judiciary, at High Court level and above, it is virtually impossible to remove a judge from office against their will. They can only be removed by the King on an address by both Houses of Parliament. No English or Welsh judge has ever been removed through this process; the only time it was ever used was when Sir Jonah Barrington, a judge of the Irish High Court of Admiralty, was removed in 1830 for corruption.[23]

This does not mean that they are completely unaccountable. A judge who loses the confidence of their colleagues may be pressured to resign. For example, in 1998 Mr Justice Jeremiah Harman was harshly criticised by the Court of Appeal for failing to deliver judgment in a civil case for 20 months.[24] Harman was already a controversial character, who was frequently accused of rudeness and discourtesy to barristers who appeared before him, particularly women, and was criticised for kicking a taxi driver in 1992 under the mistaken apprehension that he was a press photographer. After being criticised by the Court of Appeal,

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[22] Gee, G.D. (2017), "Rethinking The Lord Chancellor's Role In Judicial Appointments," Legal Ethics, 20(1). pp. 4-20 https://eprints.whiterose.ac.uk/118046/9/Gee_FINAL_Legal%20Ethics_June2017%20%281%29.pdf

[23] Courts and Tribunals Judiciary, "Judges and Parliament" https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/judges-and-parliament/

[24] *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep PN 189

Harman resigned.[25] But had he refused to resign, it would have been very difficult for his colleagues to get rid of him.

On the other hand, judges below the level of the High Court can be removed by the Lord Chancellor with the concurrence of the Lord Chief Justice. There is also a power to suspend them from office. So they have significantly less security of tenure.

Like judicial appointment, judicial tenure and accountability is an intensely controversial subject. Traditionally, in liberal democracies, security of tenure for judges has been viewed as an important safeguard against political interference with their decisions. In fact, total insecurity of tenure is likely to breach the requirement of Article 6 of the European Convention on Human Rights that cases be tried by an "independent and impartial tribunal".[26] On the other hand, a critic of the judiciary might ask whether the senior judiciary, given their virtually absolute security of tenure, are accountable to anyone except themselves.

That said, security of tenure doesn't mean judges can do whatever they like. Judicial conduct complaints are dealt with by the Judicial Conduct Investigations Office, or JCIO. And in fact, at times the JCIO has been accused of overreach. For example, Peter Herbert, a well-known Black lawyer who sat as a part-time recorder and tribunal judge, had a complaint of misconduct made against him in relation to his comments at a rally in April 2015. At the rally, Herbert spoke out against racism in the judiciary. Eventually, in 2017, a JCIO panel held that Herbert's speech was misconduct and was "likely to undermine public confidence in the judiciary". The panel held that he should be given "formal advice". The panel also held, however, that he should receive an apology for the fact that pressure had been put on him to refrain voluntarily from sitting as a judge, which should not have happened.[27] Herbert later brought a race discrimination claim in the Employment Tribunal against the Lord Chancellor and the Lord Chief Justice, which in 2021 was settled without an admission of liability.[28]

That brings us on to another important question: how representative is the judiciary of society as a whole?

Is The Judiciary Representative Of Society?

Traditionally, as I have said, the English and Welsh judiciary has been dominated by white men who attended fee-paying schools and Oxbridge. This has been a subject of much discussion in recent years. I've covered judicial diversity in many of my previous lectures, so I'm only going to touch on it briefly here.

In England and Wales, people minoritised ethnic constituted 10% of all judges in 2022, which was 3 percentage points higher than in 2014. However, this representation was not evenly distributed across the judiciary. In the senior judiciary, at High Court level and above, only 5% of judges belonged to minoritised ethnic groups. Conversely, 12% of tribunal judges belonged to minoritised ethnic groups. For comparison, minoritised ethnic people constituted 16% of barristers and 18% of solicitors, though minoritised ethnic groups representation generally fell with increasing experience and seniority. Women make up 35% of all court judges and 52% of all tribunal judges.[29]

Based on these statistics, you might think that judicial diversity in the lower levels of the judiciary isn't too bad. But the statistics also show a huge disparity in the appointment process. In 2021-22, ethnic minority candidates accounted for 23% of applications for judicial posts, but only 11% of those recommended for appointment.[30]

And the statistics don't tell the whole story. We don't have detailed statistics about the social and economic background of current judges, for instance. While the 2022 statistics contain a breakdown of how many of those recommended for appointment in 2021-22 attended a state school and were the first in their family to attend university, they do not include this information in respect of judges currently in post. This is very important. A Black man from a wealthy background who went to Eton won't have the same life experiences

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[25] The Herald, "Peers boot out Sir Jeremiah, the Kicking Judge," 14 February 1998 https://www.heraldscotland.com/news/12308465.peers-boot-out-sir-jeremiah-the-kicking-judge/
[26] See *Starrs v Ruxton* 2000 JC 208
[27] The Guardian, "Black judge claims he was discriminated against by disciplinary panel," 8 June 2017 https://www.theguardian.com/law/2017/jan/08/black-judge-in-racial-discrimination-furore
[28] The Guardian, "Retired judge Peter Herbert settles race claim against judiciary," 2 July 2021 https://www.theguardian.com/law/2021/jul/02/retired-judge-peter-herbert-settles-race-claim-judiciary-black
[29] Diversity of the judiciary: 2022 statistics https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2022-statistics
[30] Ibid.

as a Black man who grew up on a council estate and attended a state school.

Another important consideration that isn't reflected in the statistics is the professional experience of appointees, and how this has shaped their attitudes. Although the statistics tell us how many solicitors and barristers are appointed, they don't tell us what kind of law they practised, or on whose side. The outlook of a legal aid lawyer, who has made a career out of representing the oppressed, is often very different from that of a commercial lawyer who represents large companies, or Treasury Counsel who represent the Government. My experience is that the most senior judicial appointments, at High Court level and above, disproportionately go to lawyers who have spent their careers representing the powerful, rather than the powerless.

And some other groups are woefully underrepresented. For example, transgender people, whose lives are often profoundly impacted by litigation amidst the current climate of anti-trans hostility, have little representation in the judiciary.

So we don't have a judiciary that is representative of the public. And we've looked at many of the common criticisms of judges in this lecture, as well as many of the common counter-arguments. But what are the alternatives? In the next and final section of the lecture, I want to look at whether we truly need judges, what the alternatives are, and what role judges might play in a fairer and more equal society.

Considering The Alternatives

First of all, do we truly need judges? I'm going to lay my cards on the table here, and say that the answer is yes. It would be virtually impossible to maintain the rule of law and legal certainty without an independent judiciary. And at its best, the judiciary genuinely does serve as an important check on the power of the executive and the legislature, and a safeguard for minority rights.

But that doesn't mean that the role of the judiciary should remain the same as it is now. First of all, we need a much more diverse judiciary. I don't just mean that we need more women and minoritise ethnic groups in the judiciary, although we do. We also need a judiciary which is drawn from a wider range of backgrounds. We need fewer judges from wealthy backgrounds, fewer judges who attended fee-paying schools, and more judges from non-traditional backgrounds. We need judges who grew up on council estates, judges who are refugees and migrants, judges who are transgender, and judges who belong to underrepresented racial groups. And we need judges with a more diverse range of professional experience. We need fewer commercial lawyers and Treasury Counsel on the bench, and more legal aid lawyers. We need to abandon the lazy assumption that the ideal High Court judge is a barrister from a prestigious London set who got a First from Oxbridge.

Second, unlike Professor Gee, I'm not in favour of expanding ministerial influence in the judicial appointment process. However, I would be in favour of reforming the statutory framework for judicial appointments. One of the recommendations of Keir Monteith's report was to overhaul the process of judicial appointments. The authors agree with Law Society President I. Stephanie Boyce that the "statutory consultation" process, in which existing judges are asked for their views on appointments, should be abolished.[31]

I agree with that, and I think we need to go further. I think diversity should be explicitly enshrined in statute as a goal of judicial appointments, alongside merit, and should be regarded as equally important. In short, we need affirmative action in the judicial appointment process. This shouldn't just take account of race and gender, but should also include characteristics such as socio-economic background, refugee or migrant background, sexual orientation and transgender status.

Some people will take strong exception to this suggestion. They will argue that judicial appointments should be purely based on merit and should not take account of whether a person belongs to a marginalised group or not. However, that approach ignores the reality of institutional bias in our society. When it comes to judicial appointments, "merit" is a subjective concept. All too often, in the law as in other professions, selection panels will see the most "merit" in candidates who fit the existing typical profile, rather than candidates who are different. We need to take radical action to change the default image of what a judge looks like. As Keir Monteith's report says, we need to create *"a critical mass of diverse judges reflective of society, rather than occasional and isolated appointments".*[32]

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[31] Monteith et al., op. cit.
[32] Ibid.

Third, we need to diversify legal and judicial training. The Keir Monteith report argues for *"compulsory and ongoing high-quality racial bias and anti-racist training for all judges and key workers in the justice system".*[33] I agree with that. I also think we need to incorporate other kinds of training. For example, an understanding of mental health, trauma and the limitations of human memory should be part of legal and judicial training. Mental health literacy should be a core part of every lawyer's and judge's skillset. We should stop teaching young barristers that inconsistencies in a witness's account are evidence of fabrication. Legal and advocacy training need to change to reflect the current state of scientific knowledge about how witness testimony actually functions. And it would be good if lawyers and judges got some basic education in statistics, scientific literacy, and how to read and understand scientific papers. Throughout their careers, lawyers and judges will need to deal with a wide range of complex issues which are outside their experience or knowledge. Yet legal education focuses only on a narrow range of skills, and doesn't prepare lawyers for the challenges they will encounter, both as lawyers and as judges.

Fourth, we need to reconsider some of the things that we expect judges to do. In particular, we need to reform criminal sentencing, and decentre punishment in the criminal justice system. That will require not only changes in the law, but also changes in judicial culture and the perceived purpose of sentencing.

[33] Ibid.