Do We Need Judges?

Professor Leslie Thomas KC



Arguments for Judges

- Essential to the rule of law
- A check on the power of the executive



Lady Justice at Stadhuis Haarlem.jpg Justice_at_Stadhuis_Haarlem



Arguments against judges

- Unrepresentative of society
- Disproportionately drawn from privileged groups
- Not democratically accountable
- Trained in law, and not necessarily wellequipped for their role



Heads of the Law. Source: Vanity Fair 27th November 1902.



Judges as finders of facts

May make false assumptions about credibility of witnesses, e.g. that inconsistent accounts are more likely to be fabricated
May misunderstand statistics, e.g. "the prosecutor's fallacy"



Ben Goldacre in 2009. Source: TAM London 2009



Judges and morality

• Criminal sentencing mainly based on culpability/moral desert

- Judges use moralising language from the bench
- Judges are mainly drawn from privileged backgrounds, unlike defendants
- Do judges have the moral authority to sit in judgment on the conduct of others?



Judges and politics

Judges often have to make politically controversial decisions
Decision-making under the Human Rights Act 1998 has often put judges in the political firing line
The debate over "judicial activism" changes according to the political context - sometimes it's the political right decrying judicial activism, sometimes it's the left

• Sometimes judges protect the rights of marginalised minorities, other times they throw them under the bus





Mykola Gnatovskyy at the ECHR. Source: Wikimedia Commons



How are judges appointed?

- Before 2005 the Lord Chancellor played the main role in judicial appointments, in consultation with the senior judiciary
- No open and transparent recruitment process "tap on the shoulder"
- Constitutional Reform Act 2005 created the Judicial Appointments Commission and introduced open competition for judicial posts
- The Lord Chancellor now plays a very limited role
- Whether politicians should play a role in judicial appointments is hotly debated







Lord Hewart. Source: National Portrait Gallery

How are judges held accountable?

- High Court judges and above have virtually absolute security of tenure - they can only be removed by a joint address of both Houses of Parliament, which has never happened
- But they may be forced to resign, e.g. Mr Justice Jeremiah Harman
- Lower court and tribunal judges have less security and can be removed by Lord Chancellor with concurrence of Lord Chief Justice
- Judicial Conduct Investigation Office (JCIO) investigates complaints against judges
- JCIO sometimes accused of overreach, e.g. Judge Peter Herbert





Jonah Barrington, Source: British Library



Lutfur Rahman. Source: Wikimedia Commons



Is the judiciary representative of society?

Ethnic minority people constituted 10% of all judges in 2022
They constituted 5% of High Court judges and above, 12% of tribunal judges, 16% of barristers and 18% of solicitors
Women made up 35% of all court judges and 52% of all tribunal judges

No clear data on socio-economic background of judges
No data on professional career of judges - e.g. overrepresentation of commercial lawyers and Treasury Counsel as opposed to legal aid lawyers



Do we need judges?

•Yes!

But we need a more diverse judiciary - not just more women and ethnic minorities, but fewer judges from wealthy backgrounds and fee-paying schools, and more from non-traditional backgrounds
We need more judges from underrepresented groups e.g. refugees and migrants, transgender people
We need judges from a more diverse range of professional backgrounds

• We need affirmative action in judicial appointments

• We need to diversify legal training e.g. introduce training on mental health and scientific literacy



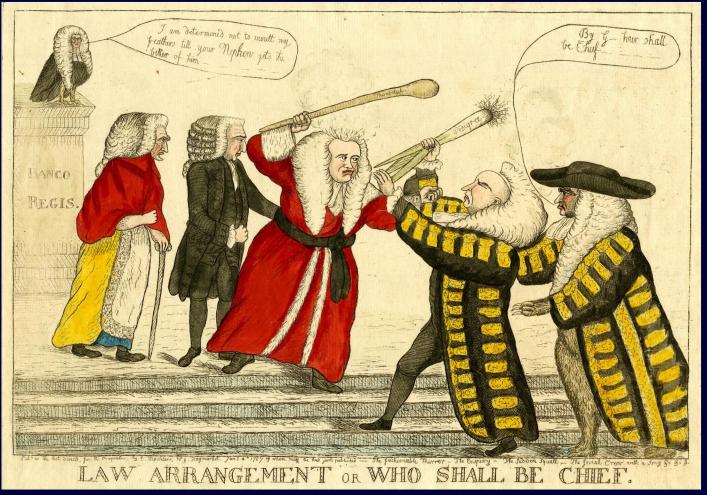


©Israeli Justices being sworn in. Source: Wikimedia Commons.



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Law Arrangement or Who shall be chief (BM J,4.116).jpg



Questions?



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