MASTER OF THE ROLLS

LORD CLARKE OF STONE-CUM-EBONY, MASTER OF THE ROLLS

SELECTING JUDGES: MERIT, MORAL COURAGE, JUDGMENT & DIVERSITY

22 SEPTEMBER 2009

1: Introduction

1. In this paper I examine the selection and appointment of judges (the appointment process). While I do so with particular reference to the system of selection and appointment now operative in England and Wales, I do so by way of an examination of what I take to be broad and universal principles. I should however acknowledge at the outset that in preparing this paper I owe a great debt to John Sorabji, who is both a lawyer and an academic. The good bits in this paper are his, the rest are mine.

2. At the outset it must be stressed that the proper selection and appointment of members of the judiciary is a matter of fundamental importance in any state committed to the rule of law. It is, as Sir Gerard Brennan, the former Chief Justice of Australia, rightly described it '*a subject of constitutional significance.*'[1] The selection and appointment of, for instance, judges unable to, or incapable of, properly applying law to true fact, without, in the words of the judicial oath '*fear or favour, affection or ill will*' would soon undermine the efficacy of any justice system. It would undermine public trust in it, and would ultimately call into question a country's commitment to the rule of law. A quiescent and timorous judiciary, unable or unwilling to act impartially or independently of the parties before it would lose public confidence. Its decisions would soon lose respect and with that would go respect for law and the rule of law. At its worst, decisions reached under the improper influence of parties, such as the Executive, could provide a false patina of legitimacy to tyranny. As Dworkin put it, '*Judges . . . can be tyrants too*', or, at the very least they can be the instruments of tyrants if they fail to, or are unable to, act independently and impartially of other state organs.[2]

3. In order to ensure that judges are neither quiescent nor timorous a state must ensure that all of its organs are committed and act in accordance with open, democratic principles, with a firm commitment to the rule of law. It must ensure that the right judges are selected and appointed and are able to carry out their judicial function independently of any improper influence. This paper assumes that judges, once appointed, are able to carry out their judicial function in a

---

[1] Brennan, *The Selection of Judges for Commonwealth Courts*, (Canberra, 10 August 2007) (Senate Lecture Series) (http://www.aph.gov.au/Senate/pubs/occa_lect/transcripts/100807/100807.pdf) at 1.
[2] Dworkin, *Law's Empire* (Hart) (1998) at 375.

proper fashion. It focuses on the necessary conditions for the selection and appointment of the right judges. In doing so it focuses on four broad principles which I take to be essential features of any selection and appointment process: one, openness; two, merit; three, good character; and four, diversity. I deal with each in turn.

Openness

4. An appointments process can either be overt or covert. Historically, the appointments process was one, notwithstanding its fundamental importance, which was in many countries shrouded in mystery, far away from public debate, scrutiny or, even awareness: it was covert. This was the approach in the United Kingdom, and it was an approach adopted for many years by other members of the Commonwealth e.g., Australia. The United States of America, as is well-known, took an entirely different approach. The United Kingdom's traditional approach was one which saw judges selected by the executive. Selection was by way of secret soundings carried out, in respect of England and Wales, by the Lord Chancellor.[3]

5. The traditional approach to selection had its advantages. It was an appointment process that, in the context of a '*small and cohesive bar*'[4] was '*swift, decisive and bold*'. It enabled individuals to be selected based on evidence supplied by their peers as to their abilities and qualities. It was however, crucially, a system that was not open to scrutiny. As such it was understood to give rise to '*actual or perceived cronyism, political or* '*reward appointments, gender bias . . .and self-selection*', by which is generally meant selection in the image of the selector and those from whom secret soundings were taken.[5] Once secret soundings had been taken and a candidate for appointment selected, appointment would then by made by the executive. As is well-known in England and Wales, the tap on the shoulder came from the Lord Chancellor, who if the approach was accepted, would then make the appropriate recommendation to the Queen or, in respect of some appointments, to the Prime Minister, who would then make a recommendation to the Queen.

6. It is fair to say that this, the traditional, system was one which, as Sir Gerard Brennan acknowledged, in general operated well and produced a judiciary well-capable of discharging the judicial function.[6] It was a system which, in general, saw judges appointed on merit; a criterion of appointment which became properly enshrined as the touchstone for appointability in England and Wales from the 1860s, although it was not properly established as such to the exclusion of other, improper political considerations, until the Lord Chancellorships of Lords Loreburn and Haldane.[7] It was a system, notwithstanding the acceptance of merit as the criterion for appointment, which could however through political affiliation, cronyism and in some cases nepotism see individuals who ought properly never to have been appointed to the bench appointed.[8] As Stevens put it, describing the problems that arose from the secret soundings-tap on the shoulder system in the early years of the 20th Century,

---

[3] In Scotland secret soundings were made by the Lord Advocate, who would then make a recommendation to the Secretary of State for Scotland.

[4] Stevens, *The English Judges: Their Role in the Changing Constitution*, (Hart) (2002) at 95.

[5] Paterson, *The Scottish Judicial Appointments Board: New Wine in Old Bottles?*, in Malleson & Russell (ed), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, (University of Toronto Press) (2006) at 14 – 15.

[6] Brennan, *ibid*, at 5.

[7] Stevens, *ibid* at 12 – 21.

[8] Stevens, *ibid*, at 20.

"*Typical of the appointments Lord Halsbury (to whom it was 'entirely normal that undistinguished Conservative backbenchers with indifferent practices at the Bar should be appointed to the High Court bench) made was Mr Justice Ridley. A former undistinguished Tory MP, the brother of the Home Secretary, he had been made an Official Referee. His appointment as a High Court judge was greeted with horror. The Law Times said bluntly: 'no-one will believe that he would have been appointed to the High Court Bench but for his connections . . . This is Ridleyism.' The appointment of John Lawrence, another Tory MP, was greeted with hoots of derision. The Law Times reported the 'bad appointment' with the observation that 'Mr Lawrence has no reputation as a lawyer, and has been rarely seen of recent years in the Royal Courts of Justice.' The warning was fair. Lawrence was such an incompetent judge that is said his decisions led to the creation of the Commercial Court. Yet these two appointments were not alone.*"[9]

They may not have been alone, but it is fair to say they were notorious. Lord Justice MacKinnon in 1944 had this to say about Lawrence and Ridley.

"*When I was the pupil of T. E. Scrutton (later Lord Justice Scrutton) from 1896 to 1897, he told me that the Only Begetter of the Commercial Court was 'Long' Lawrence.*

Mr Justice J. C. Lawrence was a stupid man, a very ill-equipped lawyer, and a bad judge. He was not the worst judge I have appeared before: that distinction I would assign to Mr. Justice Ridley. Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach."[10]

7. The benefits of the Commercial Court's creation aside, the traditional way of doing things had its drawbacks. It was a system however that formed a part of the British Constitution. It was a part that was however, even by its staunchest advocates, and at its height understood to be one that might well not be the optimum means of appointing judges. The Prime Minister of the day, Lord Halsbury's Prime Minister, Lord Salisbury, as far as he could, given the times, acknowledged this. He said this:

"*It is . . . the unwritten law of our party system; and there is no clearer statute in that unwritten law than the rule that party claims should always weigh very heavily in the disposal of the highest legal appointments. In dealing with them you cannot ignore the party system as you do in the choice of a general or an archbishop. It would be a breach of the tacit convention on which politicians and lawyers have worked the British Constitution together for the last two hundred years. Perhaps it is not an ideal system – some day no doubt the Master of the Rolls will be appointed by a competitive examination in the Law Reports, but it is our system for the present: and we should give our party arrangements a wrench if we threw it aside.*"[11]

---

[9] Stevens, *ibid*, at 15.
[10] MacKinnon, *the Origin of the Commercial Court*, (60) LQR (1944) 324 – 325. MacKinnon goes on to detail how it was Lawrance J's handling of the case of *Rose v Bank of Australasia* that eventually caused the creation of the Commercial Court.
[11] Cited in Stevens, *ibid*, at 14.

8. Matters have not yet moved to competitive examination in the Law Reports for judicial appointments, but the system of secret soundings has been replaced by a system operated independently of the executive by a Judicial Appointments Commission (the Commission).[12] This was created by sections 61 and 62, and schedules 12 and 13, of the Constitutional Reform Act 2005 (the 2005 Act), consistently with the principles agreed by Lord Woolf CJ and Lord Falconer LC in what became known as the Concordat, and took over responsibility for judicial appointments in April 2006.[13] Those principles and the reform they gave rise to were rightly intended to support the rule of law. As Lord Falconer LC, rightly, put it:

   "*. . . in a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister. For example the judiciary is often involved in adjudicating on the lawfulness of actions of the Executive. And so the appointments system must be, and must be seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence.*"[14]

9. Herein lies the nub of why a covert appointments system is unacceptable. First, whether or not such a system operates is such as to secure the appointment of individuals for improper reasons i.e., non-merit based reasons, it is a system that could be abused in such a way. Patronage as an unspoken but potential basis for appointment is something which remains latent in such a system. Appointment, or the suspicion of it, by way of patronage, or for a similar improper reason, undermines public faith in the judiciary. It undermines judicial independence, both actually where appointments are made in such a way or in the mind of the public, where appointments are believed, either rightly or wrongly to have, to be made for such reasons. As Lord Falconer put it, where the judiciary is increasingly adjudicating as to rights between individuals and the state (due to the Human Rights Act 1998 and the general increase in and development of judicial review of administrative actions by public bodies) the impression that the judiciary is not properly independent of the executive poses a threat to public confidence in the judiciary. It poses a threat to the rule of law.

10. Secondly, a covert system is one which lacks accountability. It is simply not possible to ascertain what criteria were used for appointments; how those criteria were applied in each case; why one individual was selected based on such criteria over and above another individual who may or may not have satisfied the same criteria. It is not possible to ascertain whether the appointments process operates according to either conscious or unconscious systemic or individual biases; either those of the appointer or those consulted by way of secret-sounding. Might the appointments process operate capriciously, as equity was famously said to do so

---

[12] See http://www.judicialappointments.gov.uk/index.htm.

[13] Department of Constitutional Affairs, Constitutional Reform, The Lord Chancellor's judiciary-related functions: Proposals (January 2004) (HMSO) (http://www.dca.gov.uk/consult/lcoffice/judiciary.htm) at [114] – [144]; Peach, *An Independent Scrutiny of the Appointment Process of Judges and Queen's Counsel in England and Wales*, (London, 1999) (http://www.dca.gov.uk/judicial/peach/indexfr.htm); Street, *ibid*, at 104, 125.

[14] Department of Constitutional Affairs, *Constitutional Reform: a new way of appointing judges*, (Consultation Paper) (July 2003) (http://www.dca.gov.uk/consult/jacommission/), at Foreword.

at one time, according to the length of the Lord Chancellor's foot.[15] How might such biases be challenged and overcome where the appointments process is carried on in secret? How might the individual conducting the appointments process be held to account, in such a system, if the wrong or inappropriate criteria were applied? Again, it is the case that such a lack of accountability, is something which carries with it the potential to undermine public confidence in the judiciary.

11. In order to ensure that an appointments process is carried out according to proper criteria and is a system which carries with it proper accountability it must be an open, an overt, process. This carries with it a number of factors. First, the criteria for appointment must be publicly known. Those who seek appointment, those who are appointed and the general public must be in a position to know the basis upon which appointment is assessed and made. Equally, the criteria must be publicly known so that they too are subject to public scrutiny and debate. Where judges uphold the rule of law in an open democracy, the criteria for appointment is surely a properly a matter for public debate and scrutiny. I return to the criteria for appointment below.

12. Secondly, the individuals responsible for selection and appointment must be publicly known. In England and Wales the identity and background of the fifteen Judicial Appointments Commissioners is publicly available through the Commission's website.[16] They must be capable of being held accountable for their appointment decisions. Such accountability could exist in a number of ways. It could, for instance, exist by way of judicial review of the manner in which the appointment process was conducted. Equally, it could exist by way of accountability to Parliament, the executive or another such body. It could exist as it does in the United States, for instance, through appointments being subject to legislative scrutiny, as appointments to the US Supreme Court are subject to Senate approval. Such accountability, through confirmation hearings in a Westminster-style system would however effectively and overwhelmingly place the appointment process in the hands of the executive, as it forms the dominant part of the legislature. Such a development would almost inevitably and detrimentally politicise the appointments process and the judiciary, one of whose great strengths as been its apolitical nature. It would almost inevitably transform accountability into unacceptable influence and thereby undermine judicial independence.

13. Accountability is provided for in England and Wales through the Judicial Appointments Commission (the JAC) in England and Wales having to provide the Lord Chancellor with an annual report detailing its various appointment competitions that have taken place during the previous 12 months.[17] Moreover its appointments process is subject to scrutiny in two ways. First, like any other body carrying out a public function its decisions are, in principle, subject to judicial review. In the first instance however complaints about any appointment process lies to an independent Judicial Appointments & Conduct Ombudsman.[18]

---

[15] *Gee v Pritchard* (1818) 2 Swans. 402 at 414 per Lord Eldon LC: "*Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.*"

[16] http://www.judicialappointments.gov.uk/about-jac/157.htm

[17] Constitutional Reform Act 2005, paragraph 32, Schedule 12.

[18] See Constitutional Reform Act 2006 s62 and Schedule 1; http://www.judicialombudsman.gov.uk/.

14. Secondly, its appointments processes are subject to scrutiny by the Lord Chancellor. This scrutiny arises because the JAC does not itself generally make appointments. It is a commission that makes recommendations for appointment. Recommendations are made to the Lord Chancellor before he or she makes a formal recommendation for appointment to the Queen. Through that process the appointment recommendations can be scrutinised and if found wanting can be referred back either for reconsideration of the individual or by way of outright rejection of the recommended individual. Any rejection or submission for reconsideration must be based on an assessment by the Lord Chancellor of the recommended individual's merit. Such a decision cannot be made for political or quixotic reasons and must be set out in writing. In this way the 2005 Act protects the appointments process from any potential abuse of power by the Lord Chancellor.

15. The recommendation and reconsideration process forms part of a three stage scrutiny process, which is set out in the Lord Chancellor's statutory role in the appointments process. An example of this statutory role can be found in sections 73 – 75 of the 2005 Act in respect of the offices of Lord Chief Justice and Master of the Rolls, *viz*:

"(***73) The Lord Chancellor's options***
(1) This section refers to the following stages—
(2) At stage 1 the Lord Chancellor must do one of the following—
(a) accept the selection;
(b) reject the selection;
(c) require the selection panel to reconsider the selection.
(3) At stage 2 the Lord Chancellor must do one of the following—
(a) accept the selection;
(b) reject the selection, but only if it was made following a reconsideration at stage 1;
(c) require the selection panel to reconsider the selection, but only if it was made following a rejection at stage 1.
(4) At stage 3 the Lord Chancellor must accept the selection, unless subsection (5) applies and he accepts a selection under it.
(5) If a person whose selection the Lord Chancellor required to be reconsidered at stage 1 or 2 was not selected again at the next stage, the Lord Chancellor may, at stage 3, accept the selection made at that earlier stage.

(74) Exercise of powers to reject or require reconsideration
(1) The power of the Lord Chancellor under section 73 to reject a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion, the person selected is not suitable for the office concerned.
(2) The power of the Lord Chancellor under section 73 to require the selection panel to reconsider a selection at stage 1 or 2 is exercisable only on the grounds that, in the Lord Chancellor's opinion—
(a) there is not enough evidence that the person is suitable for the office concerned, or
(b) there is evidence that the person is not the best candidate on merit.
(3) The Lord Chancellor must give the selection panel reasons in writing for rejecting or requiring reconsideration of a selection.

(75) Selection following rejection or requirement to reconsider
(1) If under section 73 the Lord Chancellor rejects or requires reconsideration of a
selection at stage 1 or 2, the selection panel must select a person in accordance

with this section.

(2) If the Lord Chancellor rejects a selection, the selection panel—

(a) may not select the person rejected, and

(b) where the rejection is following reconsideration of a selection, may not select the person (if different) whose selection it reconsidered.

Stage 1: where a person has been selected under section 70

Stage 2: where a person has been selected following a rejection or reconsideration at stage 1

Stage 3: where a person has been selected following a rejection

(3) If the Lord Chancellor requires a selection to be reconsidered, the selection panel—

(a) may select the same person or a different person, but

(b) where the requirement is following a rejection, may not select the person rejected.

(4) The selection panel must inform the Lord Chancellor of the person selected following a rejection or a requirement to reconsider.

(5) Subsections (2) and (3) do not prevent a person being selected on a subsequent request under section 69."[19]

16. Finally, the individuals responsible for selection ought properly to be independent of the executive or legislature. In England and Wales, for instance, the Judicial Appointments Commissioners are appointed through open competition according to the principles applicable to public appointments. In carrying out their role they exercise their powers independently of government and, also, of the legal professions. It might be argued that those responsible for appointment must also be independent of the executive or legislature by way of confirmation hearings. There remains no appetite in England and Wales for confirmation hearings, not least because of the fear, noted earlier, that to introduce such hearings into the appointment process would inevitably politicise them to a degree that has not occurred in the past.

17. While some, such as Professor Malleson, suggest that as the judiciary through its decisions enters the political arena more often it will become harder to resist the introduction of such confirmation hearings, it seems to me that both developments should be resisted. One of the great strengths of an independent judiciary is that it is seen to be independent of political considerations. We would lose much by politicisation of the judiciary. Ultimately in England and Wales the appointments process is not placed in the Lord Chancellor's hands. If the appointments process reaches stage three, as section 73(4) of the 2005 Act, the Lord Chancellor must accept the selection. While the JAC is a recommending commission it is one that in certain circumstances can have the final say in the appointment process.[20]

18. It seems to me unarguable that an open, democratic society committed to the rule of law cannot but adopt an appointments process that is based on a commitment to openness. While the nature of that openness can legitimately take different forms e.g., through an appointments commission wholly independent of the government which makes appointments or through an appointments commission appointed by the executive through open competition, which operates independently of the executive, and which makes recommendations for appointment, it is a *sine qua non* of a proper appointments process today.

[19] Also see Constitutional Reform Act 2005 ss 82 – 84, 90 – 93, which apply the same process to Court of Appeal and High Court appointments.

[20] Malleson, in Malleson & Russell (ed), *ibid* at 46 – 49.

Openness equally must apply not just to the Commission and its processes, but to the application process itself. Criteria for appointment must be publicly known, and where necessary the subject of public debate. If these three features ((i) an open and accountable appointments Commission; (ii) an open appointments process carried out fairly and properly; and (iii) an openly known set out criteria for appointment applied during any appointments process) are properly in place the basis for appointing a judiciary capable of carrying out its judicial function without fear and favour according to the law will be in place.

19. In England and Wales we have since the 2005 Act reforms had in place an appointments system which complies with these three features of openness. The appointments process is now carried out, as I have noted, by an independent appointments commission (the JAC) and is carried out in an open way. It is also carried out according to known criteria for appointment; criteria which are set out in the 2005 Act. In carrying out its appointment role the Commission is required to comply with three statutory duties.[21] Those statutory duties provide the criteria for appointment and are set out in sections 63 and 64 of the 2005 Act. The duties are: one, to select candidates for appointment on merit (s63(2)); two, to ensure that it is satisfied that the candidate is of good character (s63(3)); and three to ensure that in carrying out its appointment role it has '*regard to the need to encourage diversity in the range of persons available for selection for appointments*' (s64(1) & (2)). In these three criteria lies the basis for appointments in the 21St Century.

2: Merit

20. There is little doubt that of the three criteria for appointment, first amongst equals is and must be, merit. Merit is a criterion however that is, to some degree, mutable. As Professor Paterson put it,

    "*. . . merit selection . . .[has] a spurious clarity that disintegrates on closer analysis, since [it is] culturally and contextually determined . . Merit selection is one of the shibboleths which dominates past and contemporary discussions of judicial appointments in Scotland and England. Throughout the constitutional debates of the last few years ministers have repeated the mantra that any changes to judicial appointments would retain the principle of merit selection. . . . [The] concept has an apparent objectivity that mask is protean actuality.*"[22]

    It is true to say merit, as a criterion, is, as Professor Paterson put it, versatile. At one time, merit was synonymous with political service. Equally, it once was equated with simply holding certain other offices, such as that of Attorney-General, which provided the basis for appointment as Lord Chief Justice of England and Wales. It was also, and until more recently, equated with ability as an advocate.[23] Given that merit selection is the necessary, and as the JAC puts it consistently with the terms of s63(2) of the 2005 Act, the sole condition for appointment, it cannot be left as a moveable feast.[24] What then does merit mean?

21. Prior to the 2005 Act reforms which created the JAC a number of criteria were used to define merit. Those criteria were set out in the Government's 2003 consultation paper on judicial appointments. It defined merit as follows:

---

[21] Constitutional Reform Act 2005 s63(1).
[22] Paterson, in Malleson & Russell (ed), *ibid*, at 14 – 15.
[23] Street, *ibid*, *passim* and at 95.
[24] http://www.judicialappointments.gov.uk/about-jac/9.htm

"(7) The Lord Chancellor may only appoint (or recommend for appointment) to judicial office those who meet the statutory qualifications. Beyond that, 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. Decisions on merit are based on assessments of candidates against the specific criteria for appointment.

(8) In summary the criteria for appointment are:

- *legal knowledge and experience*
- *intellectual and analytical ability*
- *sound judgement*
- *decisiveness*
- *communication and listening skills*
- *authority and case management skills*
- *integrity and independence*
- *fairness and impartiality*
- *understanding of people and society*
- *maturity and sound temperament*
- *courtesy*
- *commitment, conscientiousness and diligence*

(9) The Lord Chancellor has considered it important that those seeking full-time judicial appointments have relevant experience of sitting part-time, and will not normally appoint someone without such experience. The Lord Chancellor has not, however, regarded advocacy experience in itself as an essential requirement for legal appointments to judicial office."[25]

22. Having established that an individual is properly eligible for appointment, by reference to whether they satisfy the statutory qualification, the Lord Chancellor had to apply a number of criteria to assess an individual applicant's merit.[26] In addition to those criteria, experience as a part-time judge was an important factor. Importantly, if as was and is the case, appointment is not to be restricted to members of the Bar, actual advocacy experience was not a relevant factor for appointment. In this way the appointments process was open to solicitors, who did not practice advocacy, and in some cases those who satisfied the statutory qualification but whom had not practiced e.g., legal academics or law commissioners.

23. The JAC has since its inception applied similar specific criteria in assessing merit as part of the appointments process. It, consistently with a commitment to openness, has made these criteria public. The JAC describes those qualities and abilities which it understands as necessary for appointment as follows:

"1. Intellectual capacity

- *High level of expertise in your chosen area or profession*
- *Ability quickly to absorb and analyse information*

[25] See http://www.dca.gov.uk/consult/jacommission/#f3.

[26] The statutory qualification for appointments are, for instance, set out in: Constitutional Reform Act 2005 s25 (as from 01 October 2009); Supreme Court Act 1981 s10; Courts Act 1971 s16; County Courts Act 1984 s9.

- *Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary*

2. Personal qualities

- *Integrity and independence of mind*
- *Sound judgement*
- *Decisiveness*
- *Objectivity*
- *Ability and willingness to learn and develop professionally*

3. An ability to understand and deal fairly

- *Ability to treat everyone with respect and sensitivity whatever their background*
- *Willingness to listen with patience and courtesy*

4. Authority and communication skills

- *Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved*
- *Ability to inspire respect and confidence*
- *Ability to maintain authority when challenged*

5. Efficiency

- *Ability to work at speed and under pressure*
- *Ability to organise time effectively and produce clear reasoned judgments expeditiously*
- *Ability to work constructively with others (including leadership and managerial skills where appropriate)*

The precise qualities and abilities for each post will be published in the information pack for each exercise."[27]

24. The JAC's list is in many ways no more than a restatement, albeit more detailed, of the criteria that the Lord Chancellor was using by the 2003 Consultation. It seems to me that the qualities and abilities identified by the JAC are ones which can properly be taken account of in assessing merit in any judicial applications process. They articulate essential qualities any judge must have if they are to properly carry out the judicial function.

25. Legal ability is required. It is not sufficient simply to meet the statutory qualification; a candidate must be able to demonstrate a suitable understanding of the law and an ability properly to apply it to relevant fact. Moreover appropriate knowledge is sought. This is an important qualification. It is important because the level and nature of legal expertise, and the ability to properly apply law to properly found fact, will differ depending on the nature of

[27] http://www.judicialappointments.gov.uk/application-process/112.htm

the appointment. The considerations relevant to an application for appointment as a first instance judge in the County or High Court can properly differ from those relevant to appointment as a judge of the Court of Appeal of England and Wales or Justice of the United Kingdom Supreme Court (the latter being who before 01 October 2009 were known as Law Lords). The latter appointments may well require greater expertise in law than they do an ability to apply law to fact or an ability to find relevant fact. Such different considerations might, for instance, make it more likely that a legal academic or law commissioner, unused to litigation and the conduct of trials, could be appointed to the appellate bench than to a first instance bench.

26. Legal ability can however be understood in two ways. It can be understood in the abstract or more practically. What do I mean by this distinction? By legal ability in the abstract I mean theoretical knowledge and understanding of the law. All legal experts, practitioners, academics, judges will have this type of legal ability. It is the practical application of that theoretical knowledge to legal disputes which a successful judge needs. Abstract ability is not enough; practical judgment exercised decisively and objectively having given proper and fair consideration to the substantive merits of the parties' arguments while focusing on the real legal issues, in good conscience, independently and with integrity is needed. Abstract ability does not necessarily equate with practical ability. As Professor Solum put it, *"Even a very smart judge can have terrible practical judgment.*"[28] Judges must, in Solum's terms, be both very smart and have good practical judgment. They must have both abstract and practical legal knowledge. Appointment based on merit requires these factors to be taken account of in the appointment process.

27. Merit is however properly recognised as going wider than abstract and practical legal ability. Something more is required. The criteria recognise that managerial skills are required. No longer in England and Wales are judges passive umpires standing serene above the fray. Since the introduction of active case management in criminal, civil and family jurisdictions all judges are positively required to ensure that claims progress efficiently and economically to trial, or settlement. Judges must be able to manage themselves, and, where necessary, court staff and litigation properly.

28. Merit can be understood to go wider than the qualities listed by the JAC. It could, for instance, as it does in South Africa require the appointment process to take account of the 'collective competence' of the judiciary when assessing an applicant's merit. This is taken account of during the selection process, as Professor Malleson outlines, because it is permissible to take account of '*the background of candidates [and this is done] on the grounds that a more diverse judiciary enhances its collectively (sic) competence.*'[29] In other words individual merit requires a consideration of the overall constitution of the judiciary. Other factors could be taken account of or given greater weight than others in assessing merit. Academic ability, abstract legal ability, might be given greater weight than practical legal ability, for instance, in respect of selection for Supreme Courts, where the development of general principles of public importance is central to the judicial function. Canada to a degree takes this approach. The factors that can be taken account of in assessing merit are not limited to those specified by the JAC. What is important however is that those criteria are publicly known and accepted

[28] Solum, *Judicial Selection: Ideology vs Character,* Cardozo Law Review (26.2) 659 at 674 (http://www.cardozolawreview.com/content/26-2/SOLUM.WEBSITE.pdf).
[29] Mallleson, in Malleson & Russell (ed), *ibid*, at 8 – 9.

as proper criteria for selection. However merit is defined it remains the only proper criteria for appointment.

3: Good Character

29. Merit is not however the only criterion. If there is to be proper confidence in the judiciary individuals appointed must be of good character. In contrast to the merit criterion good character does not excite a great deal of debate. There is little dispute that an individual convicted of a serious criminal offence, for instance, could not properly be appointed or if already appointed remain a judge. It is uncontroversial that an individual appointed as a judge must not only be seen and understood to be competent and able to exercise the moral courage needed to adjudicate fairly and justly, which comes through the merit criterion, they must also be trusted as individuals who will do so. Good character is essential to building this trust and confidence. It is difficult to conceive of a judiciary that could be trusted by the public to deal with cases justly, to do justice, if its members were not of unimpeachable character. It is often said that solicitors must be capable of being trusted to the ends of the earth.[30] Members of the judiciary are an *a fortiori* case in this regard.

30. In general this criterion is one that is, I noted uncontroversial. It is uncontroversial where an applicant has been convicted of a serious criminal offence, particularly one which involved dishonesty, or corruption. Individuals who have or who are likely to accept bribes should not, for instance, be seen as being of good character. It is also likely to be uncontroversial where there is proven dishonesty absent criminality or where there is, for instance, evidence that the individual has in other capacities engaged in what could be said to be an abuse of power or position or where an individual has been subject to professional sanction.[31] Equally, as Professor Solum has it, moral cowards should not be seen as having good character.[32] It might equally be said an individual who puts their own ambition, like a lean and hungry Cassius, before discharging the judicial function might not properly be said to have good character. In other words individuals who are likely to be swayed by public opinion, who might not make the right, the just decision because it is an unpopular decision or because it is adverse to their interests cannot properly be seen as having good character. Moral courage rather than moral cowardice is needed for good character to be satisfied. As Lord Judge CJ rightly put it:

    "*Judges must also have moral courage – it is a very important judicial attribute – to make decisions that will be unpopular whether with politicians or the media, or indeed the public, and perhaps most important of all, to defend the right to equality and fair treatment before the law of those who are unpopular at any given time, indeed particularly those who for any reason are unpopular.*"[33]

    Moral courage is an aspect of good character. It is of crucial importance as an element of the good character assessment.

---

[30] *Bolton v The Law Society* [1994] 1 WLR 512 at 518 – 519.

[31] http://www.judicialappointments.gov.uk/static/documents/Good_Character_Guidance_01_June_09.pdf.

[32] Solum, *ibid*.

[33] Judge, *Diversity Conference Speech*, (London) (March 2009) (http://www.judiciary.gov.uk/docs/speeches/lcj-speech-diversity-conf.pdf) at 2.

31. There is a risk however that this criterion could be expanded beyond this in impermissible ways. Good character might, for instance, be used to refer to political or social beliefs or practices which the recommending or appointing body did not agree with. It might be used, for instance, impermissibly to refuse appointment to an individual on the grounds that their political beliefs were inconsistent with or opposed to those of the executive or legislature. It seems to me that such an expansion of the good character criterion would be an improper expansion of it. If relevant at all, such considerations are relevant to merit and only insofar as any particular belief held by an individual adversely effected their ability or capacity to apply right law to right fact, to decide cases without fear or favour and without bias or partiality. To expand the good character criterion to one that saw appointment refused on what would in truth be disapprobation of an individual's political or religious beliefs, their sexuality, marital status, or their social status is as inappropriate as appointing someone because of their social or educational background.

32. Good character must remain that, a criterion based on honesty, integrity and moral courage.

4: Diversity

33. Finally, I turn to diversity. One of the reasons why the covert system of secret soundings and taps on the shoulder was no longer sustainable in the United Kingdom as the 21st Century began was that it was understood to be an inadequate means to promote a diverse judiciary. As Professor Malleson put it,

> "*A more immediate and pressing rationale for change [was] the need to tackle the diversity in the composition of the judiciary. The narrow background from which the judiciary is drawn, particularly at senior levels, has become its Achilles' heel. Almost the only fact that many known about judges in England and Wales is that they are generally elderly, white, male barristers educated at private schools and at Oxbridge.*"[34]

34. If a judiciary is able to maintain the confidence of the public, just like the executive and legislative branches of government, it must be properly representative of the state. It may well be the case that a judiciary drawn from a single group within society may well be able to ensure that justice is done through applying right law to right fact according to the judicial oath. But justice must not simply be done, it must be seen to be done. It cannot properly be seen to be done, in a liberal democracy committed to the rule of law, in such circumstances. A diverse judiciary, applying right law to right fact according to the judicial oath, is the only proper means whereby justice can not only be done but, crucially, can be seen to be done. The rule of law requires confidence and a firm belief in the instruments of governance by the governed. It requires a commitment by all elements of the state to a core set of democratic values and principles; values and principles reached through open, critical debate. We do not, nor do I think would any of us want to, live in a Platonic Republic ruled by an elite class of Guardians or Philosopher Kings. We ought not therefore accept a judiciary drawn from a discrete group of individuals within society as a whole. One of the great strengths of the judiciary is the experience that judges bring to their decisions. As a collective body, like the strands that go to make up a rope, that judgment is collectively stronger, for being built of diverse strands. Not just stronger, but importantly, better able to command the necessary respect that the judiciary, like

---

[34] Malleson, in Malleson & Russell (ed), *ibid*, at 42; cf, Department of Constitutional Affairs (2003) at Foreword.

the other branches of the state, needs to be held in so as to maintain society's commitment to the rule of law. It seems to me that as Professor Malleson rightly put it any failure to achieve judicial diversity would in respect of the judiciary of England and Wales, and by extension of other judiciaries, have a '*corrosive effect . . . too great to ignore.*'[35]

35. The first point I would make therefore is that the promotion of diversity is a necessary prerequisite to maintaining confidence in the judiciary and the rule of law. The second point goes further than this. It is not just concerned with maintaining confidence in the judiciary. It is concerned with increasing confidence in the judiciary, and therefore increasing confidence in our commitment to the rule of law. The point is a very simple one: the merit criterion is properly satisfied through encouraging diversity.

36. The basis of appointment is merit. Those who best exemplify the qualities and abilities that form the criteria by which merit is assessed should be appointed. The strength of the judiciary increases as the merit of those appointed increases. Any appointment process will necessarily draw from a pool of talent eligible for appointment. It is in everyone's interest to have the widest possible pool of talent from which appointments can be drawn. To borrow a phrase it is better to be first in a field of many, than first in a field of one. When there is wide competition assessed by the same criteria, those who lead the field are more likely to be genuine leaders rather than simply there by default.

37. It is absolutely essential therefore that active steps are taken, as is now required by s64(1) & (2) of the 2005 Act in England and Wales, that appointments processes take active steps to encourage all those who are eligible for appointment to apply. It is no longer sufficient to carry on as before. Barristers, solicitors, legal executives, academics must be encouraged to apply where they meet the statutory qualification. Those who do not practice advocacy must be encouraged to apply; if not the majority of the solicitors' branch of the profession will remain, in practice, outside the pool from which the judiciary are drawn. And indeed the selection process must ensure that it treats all applicants for appointment equally and fairly. Only in this way can it ensure that the merit criterion is properly and fairly applied to all and that those with the greatest merit are appointed.

38. Different considerations will of course apply to countries that have a career judiciary. Diversity can in those countries be encouraged in different ways. In countries such as England and Wales however where the judiciary is drawn from the ranks of the legal profession, in its widest sense, diversity cannot but be encouraged by ensuring that not only are all sectors of the profession properly encouraged, and are able to apply, but that the legal professions are themselves properly representative of society as a whole. A profession, as the judiciary is, drawn from the ranks of other professions requires those professions to be diverse otherwise it cannot itself be properly diverse. It seems to me therefore that those who argue that the legal professions themselves need to be as diverse as possible in order to further the rule of law are right. They are right because only by encouraging diversity in the professions can the conditions be properly created for the judiciary itself to be properly diverse and reflective of society. The two go hand in hand. If the legal profession is not properly diverse, then our commitment to the rule of law is undermined. It is undermined because the

[35] Malleson, *ibid*.

judiciary, drawn from its ranks, cannot be properly diverse and the corrosive effect identified by Professor Malleson takes root to our detriment.

5: Conclusion

39. I started at the outset by noting that I would look at the selection and appointment process by way of general principles. There are it seems to me four principles which must be given proper effect if any judiciary is to command the trust of an open democratic society today. It must be appointed through an open process. It must be appointed solely on the grounds of merit, according to clear criteria that are publicly known. It must be selected from candidates of good character, of moral courage. It must be properly diverse and reflective of society, subject to merit. This requires society to take steps to ensure that the pool of candidates is itself a properly diverse one, so that the best and most meritorious candidates can then be appointed from that pool. If these elements, and there is of course room for debate and different approaches to how they are implemented, are properly implemented it seems to me that the 21st Century judiciary will have strong foundations and will be as well-placed as any judiciary ever has been to exercise judgment, to act with moral courage, to decide cases according to law without fear or favour. It will be in a strong position to support, and embody, our commitment to the rule of law.
