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Judicial Appointments: *Balancing Independence, Accountability and Legitimacy*

Keith Etherington, Solicitor Advocate (Civil)

Law Society Council Member for Civil
Litigation Practitioners

The United Kingdom



Just so that we are clear!

- Throughout this presentation the use of the word **solicitor** refers to a Solicitor of the Supreme Court of Judicature not:



Solicitors not barristers



Sorry but most of us don't wear wigs

Solicitor of the Supreme Court

- Case work
- Advocacy in lower courts
- Higher rights available
- Barristers are specialist advocates
- Used only when needed
- Solicitors work in firms
- Barristers in chambers

Legal Executives

- Another type of lawyer
- Predominantly employed by solicitors
- Restricted rights of audience in court
- No university degree needed
- Most train part time whilst working





Ranks of Judge



- District Judge (Civil)
- District Judge (Criminal)
- Circuit Judge
- High Court Judge
- Lord Justice of Appeal
- Justice of the Supreme Court

The Position before 1990

- Effectively a tap on the shoulder system
- Stigmatised by critics as a system of 'secret soundings'
- Appointed by the Lord Chancellor
- Merit key to the selection process
- Predominantly barristers
- Individuals recommended by the judiciary approached to see if they wanted a judicial role
- Seen as a peer appraisal system with the serving judges well placed to assist with the assessment of individual candidates



Changes in the early 1990s

- The Courts and Legal Services Act 1990
- Opened general applications to solicitors and barristers
- Merit based process
- Should have held a part time role first
- Higher court positions still filled by promotion from the current judiciary
- An invitation to be a High Court judge not dependent on an application
- Still seen as elitist with the highest positions filled by barristers

September 1994 – First openly advertised judicial vacancies

- Advertisements in the national and specialist legal press
- Job descriptions and statements of eligibility and selection criteria for each judicial office
- An application form designed to elicit information to enable applicants to be assessed against the published selection criteria
- Consultation with judges and members of the legal profession
- Interview by a judge, a member of the Judicial Appointments Group and (for the first time) a lay person.

Which way next?

- Developments had been incremental
- Still criticism of appointment process
- Various models of judicial appointments considered
- Various consultations including the Peach report recommending that judges need not have an advocacy background
- Three models for appointments

■ **EXECUTIVE APPOINTMENT**

- i.e. Government appointment
- Ignores people from non-conventional backgrounds

■ **LEGISLATIVE APPROVAL**

- For senior judges only
- Used in USA and Germany
- Judges may satisfy political appointers?

■ **JUDICIAL APPOINTMENT COMMISSIONS**

- Seen as most independent system

Separation of Powers: the UK's problem

LEGISLATURE



The Lord Chancellor

THE EXECUTIVE

THE JUDICIARY

Constitutional Reform

- UK's constitution flexible and not entrenched
- Extremely elaborate, almost all of which is written: in statutes, in recorded statements in Parliament, judgments from the courts and some authoritative texts.
- All aspects can be amended by a simple majority in Parliament.
- No need for a referendum
- In Victorian times seen as the efficiency of the British state
- A less confident age is not so sure

Constitutional Reform Act 2005

- Not quite as reforming as the title implies
- Abolished the role of Lord Chancellor as Speaker of the House of Lords
- Removed the Lord Chancellor's judicial function and instead made the Lord Chief Justice the head of the judiciary
- Created a new Supreme Court to replace the Appellate Committee of the House of Lords
- Created a new Judicial Appointments Commission
- A procedure for the discipline and removal of judges
- Concentrated on judicial independence; ignored the fusion of the Executive and the Legislature

The new Supreme Court



- Replaces the House of Lords
- Home of the Privy Council
- Parliament square now reflects the separation of powers

The Judicial Appointments Commission

- A duty to do its best to encourage applications from the widest possible range of eligible candidates, including those from non-traditional backgrounds
- But having done so, it must select amongst them according to their aptitude for the job and nothing else.
- The JAC established a Diversity Forum to make a concerted effort to improve diversity
- It participates in the work of specialist groups such as the Black Solicitors' Network and worked with the Law Society to create a video
- Widening the pool of applicants a key role of the JAC

Other changes since 2005

- Tribunals, Courts and Enforcement Act 2007
- Fellows of the Institute of Legal Executives (ILEX) eligible to apply for selected judicial roles from November 2008
- Experience reduced from 7 years to 5 years
- Academics with relevant experience may also apply

The new appointment process

- Written application with three referees, but a judicial referee not required
- Written closed book exam
- Two role plays to assess judicial thinking
- Interview in front of a serving judge, a lay person and a commissioner/representative of the commission

Business case for change

- A judiciary that has public confidence is essential for major disputes
- International disputes resolved in countries with demonstrable judicial independence
- London is a major centre for international dispute resolution and home to many of the world's largest law firms
- Critical for the system to change if London was to maintain its position in the world
- London promoted as the “*Jurisdiction of Choice*”

Relevant links

The following two publications (and this presentation)

1. Judicial Appointments: Balancing Independence, Accountability and Legitimacy

2. Jurisdiction of Choice

can be downloaded at:

www.keithetherington.co.uk

I can be contacted via that web page or www.mnj.co.uk